(1)

91-762

NO. 91-____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUGHES ANDERSON BAGLEY, JR.,

Petitioner

v.

CMC REAL ESTATE CORPORATION aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; and, NORMAN W. PRINS,

Respondents.

MARTHA M. McMINN
Shuminsky, Shuminsky & Molstad
Attorneys for Petitioner Bagley
224 Davidson Building
Sioux City, IA 51101
Phone: (712) 255-8036

QUESTIONS PRESENTED

I

Whether the Court of Appeals' opinion is in conflict with precedent from this court governing the point at which a claim accrues?

II

Whether the Court of Appeals' opinion is in conflict with the opinions of those federal courts which have squarely addressed the issue of whether a civil rights claim based on an unconstitutional conviction accrues at the time the plaintiff first learns of the underlying facts or on the date of reversal?

III

Whether, in finding that Petitioner was not collaterally estopped from success fully prosecuting his civil rights claim until his criminal conviction was reversed, the Court of Appeals incorrectly found that the issue of whether Bagley's criminal conviction was unconstitutional was different from the issue of whether the individual Respondents had violated his constitutional rights?

IV

Whether the Court of Appeals' opinion fails to strike the proper balance between the competing concerns embodied in statutes of limitations, the doctrine of collateral estoppel, the goal of judicial economy, and the federal interest in permitting prosecution of meritorious civil rights claims?

PARTIES TO THIS ACTION

The only parties to this action are those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURTS OF APPEALS CASES

DISTRICT COURT CASES

STATE COURT DECISIONS

STATUTES

RULES OF COURT

In the Supreme Court of the United States

October Term, 1991

No. 91-_____

HUGHES ANDERSON BAGLEY, JR.,
Petitioner

v.

CMC REAL ESTATE CORPORATION aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; and, NORMAN W. PRINS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Hughes Anderson Bagley, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Bagley v. CMC Real Estate, et al*, 923 F.2d 758 (9th Cir. 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-12a) is reported at 923 F.2d 758 (9th Cir. 1991). The Order of the district court (App., *infra*, 13a-14a) adopting a Magistrate's Report & Recommendation (App., *infra*, 15a-31a) was not reported.

JURISDICTION

The Order of the Court of Appeals denying rehearing was entered on June 3, 1991 (App., *infra*, 32a-33a). This petition has been filed within the time allowed by an extension granted pursuant to Rule 20.1 by Justice O'Connor on September 4, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

JURISDICTION BELOW

The district court's jurisdiction was founded in Title 28 U.S.C. Section 1331. The Court of Appeals' jurisdiction was founded in Title 28 U.S.C. Section 1291.

STATEMENT

1.) In August, 1988, Bagley filed this action pursuant to the United States Constitution, a "*Bivens*" action, and Title 42 U.S.C. Sections 1983 and 1985. Bagley alleged that Respondents Prins and Mitchell and James P. O'Connor, a defendant who is not a party to this action because he could not be located and was never served, violated Bagley's federally protected rights while acting in their respective capacities of federal and state law enforcement officers. Bagley also alleged that, as successors to the Chicago, St. Paul and Milwaukee Railroad, Respondents Soo Line and CMC Real Estate were also liable because of the Milwaukee Road's failure to properly train and supervise Mitchell and O'Connor.

2.) To summarize the Complaint, Bagley alleged that in April, 1977, while acting as a federal law enforcement officer, Respondent Prins solicited the services of Respondent Mitchell and O'Connor, both of whom were state commissioned law enforcement officers, in an

investigation of Bagley and that Respondent Mitchell and O'Connor agreed to Prins' request for assistance. Bagley further alleged that Respondent Mitchell and O'Connor, with the knowledge and assistance of Respondent Prins, made false sworn statements for the purpose of concealing the fact that Mitchell and O'Connor were being paid for their assistance and that as a result of those false statements, Bagley's federally protected rights were violated and he was wrongfully convicted and imprisoned.

3.) Mitchell and O'Connor made their false sworn statements in May, 1977. Bagley was tried and wrongfully convicted as a result of those false statements in December, 1977. Bagley first learned that the statements denying payment were false in May, 1980. Bagley's 1977 conviction was reversed for the first time in October, 1983, and, after remand by this Court, was reversed again in September, 1986. 1/

4.) This action was filed on August 18, 1988, less than two years after the Court of Appeals finally reversed

---

1/ The facts supporting Petitioner's claim for damages and the relevant time frames are well documented in the published opinions of this Court and the United States Court of Appeals for the Ninth Circuit. The 1977 conviction which resulted from the concealment of the fact that Respondent Prins had secretly paid Respondent Mitchell and O'Connor was first addressed by the Ninth Circuit in *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983). The government obtained *certiorari* and the case was remanded back to the Ninth Circuit by this Court for reconsideration. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985). On remand, the Ninth Circuit reversed the 1977 conviction again in *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). For purposes of this Petition, the critical date is September 2, 1986, the date of the decision in *Bagley v. Lumpkin*, 798 F.2d 1297.

the unconstitutional 1977 conviction.

5.) There is no dispute as to the historical facts. As agreed by the parties throughout the proceedings below, and as found in the Court of Appeals' opinion, (App., *infra,* 1a-12a, and documented in the opinions cited in footnote 1 to this brief, the relevant facts are as follows.

a.) In May, 1977, Respondent Mitchell and O'Connor entered into written agreements with the Bureau of Alcohol, Tobacco and Firearms (BATF) whereby they would be paid for their services as informants against Bagley. Mitchell and O'Connor also executed false sworn statements denying that they would be paid for such services.

b.) In the Fall of 1977, prior to Bagley's criminal trial in the United States District Court for the Western District of Washington, case number CR77-330V, Bagley's defense counsel asked the government for information as to any rewards or inducements given to Mitchell and O'Connor for their testimony against Bagley. The Assistant United States Attorney in charge of the case, who had not been advised of the written contracts calling for Mitchell and O'Connor to be paid, responded by producing copies of the sworn statements which falsely denied any expectation of payment. Bagley was convicted at trial.

c.) In May, 1980, Bagley learned through the Freedom of Information and Privacy Acts, 5 U.S.C. sections 552 and 552a, that Mitchell and O'Connor had in fact been paid for their testimony at trial and had signed contracts providing for such payments several months prior to trial.

d.) After more than six years in the courts, Bagley's

1977 criminal conviction was reversed for the second and final time on September 2, 1986.

e.) This action was filed on August 18, 1988.

6.) The Respondents moved for judgment on the pleadings on the theory that the statute of limitations had run prior to the action being filed because Bagley's cause of action accrued and the statute of limitations began to run in 1980 when Bagley first learned that Mitchell and O'Connor had been paid and that their statements denying any expectation of payment were false. Bagley resisted judgment on the pleadings, contending that his cause of action did not accrue until September 2, 1986 when his conviction was finally reversed because until then he had no discernible, quantifiable injury and because he would have been collaterally estopped from alleging that his 1977 conviction was unconstitutional until the conviction was finally reversed.

7.) The Magistrate filed a Report and Recommendation (App., *infra*, 15a-31a) which found that the statute of limitations had run because Bagley's claim accrued in 1980 when he first learned that Mitchell and O'Connor had in fact been paid for their testimony. The Report and Recommendation also concluded that in order to allege a conspiracy to violate federally protected rights under Title 42 U.S.C. Section 1985(2), a plaintiff must demonstrate that he is a member of a protected class, a finding not challenged here.

8.) The District Court adopted the Report and Recommendation in its entirety by reference in its Order (App., *infra*, 13a-14a).

9.) On Appeal, the United States Court of Appeals for

the Ninth Circuit affirmed. In an opinion published at 923 F.2d 758 (App., *infra*, a-12a), the Court of Appeals found that while:

> Bagley argues that because he had no cognizable, compensable injury until his unconstitutional 1977 conviction was finally reversed in 1986, his cause of action did not accrue until that time. *There is some appeal to this argument. Nevertheless, precedent compels us to reject this theory.* (Emphasis added.)

App., *infra*, 5a. The Court of Appeals went on to hold that:

> Other circuits, as well as our own have *implicitly* held that habeas corpus proceedings do not delay accrual of Section 1983 claims. (Emphasis added.)

App., *infra*, 7a. The panel then held that Bagley's cause of action:

> . . . accrued for statute of limitations purposes when he first learned of the injury giving rise to his claims, and not at the completion of his habeas corpus proceeding.

App., *infra*, 8a.

Citing *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), the Court of Appeals found that its conclusion that Bagley's claim had accrued when he first learned the underlying facts in 1980, rather than when his conviction was finally reversed in 1986, was consistent with the policy that statutes of limitations represent a legislative judgment that it is unjust to fail to

put an adversary on notice within a specified time limit. It found this to be so because during the period between 1980 and 1988, none of the defendants had known that Bagley contemplated bringing an action against them and could take no steps to preserve evidence, a fact which it found was likely to be prejudicial. While finding that it was "not without appeal", the Court of Appeals rejected Bagley's argument that it was in the interests of judicial economy to hold that civil rights actions of the type in issue here did not accrue unless and until the conviction was reversed because it found the price of delay too high and felt that the judiciary could conserve resources by simply staying civil rights cases of this type until the habeas proceedings have been completed. The Court of Appeals also expressed a concern that Bagley's approach would extend statute of limitations indefinitely because there are no limitations on habeas corpus. App., *infra,* 8a-9a.

Finally, the Court of Appeals found that Bagley would not have been collaterally estopped from asserting his claim prior to the reversal of his conviction because the issues presented in this case and in his Section 2255 motion were different, and noted that in any case he could have filed this action and then asked the District Court to stay the case pending the outcome of the Section 2255 motion. App., *infra,* 9a-10a.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH PRECEDENT FROM THIS COURT GOVERNING THE POINT AT WHICH A CLAIM ACCRUES.

A. The Requirement For A Discernible, Quantifiable Injury

While finding that it had "some appeal", App., *infra*, 5a, 8a, the Court of Appeals rejected Petitioner's contention that his civil rights claim did not accrue until his unconstitutional conviction was reversed on collateral attack because he had no cognizable, quantifiable injury until that time. Instead, the Court of Appeals held that the claim accrued when Bagley first learned that Mitchell's and O'Connor's statements denying that they would be paid for their testimony were false.

While this Court has never squarely addressed the issue of whether a civil rights claim based on an unconstitutionally obtained criminal conviction can or does accrue before the conviction is vacated, the Court of Appeals' ruling conflicts with prior decisions of this Court in several ways.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court found that even though a land owner's use of property was restricted for several years, a claim for taking without just compensation had not yet accrued for purposes of a Section 1983 action because there had not been a final decision by the local Planning Commission as to whether to apply certain regulations in such a way as to limit the owner's use of the property, a position analogous to the one Petitioner himself in until his conviction was finally reversed. In *Williamson County Planning Commission,* this Court reasoned that the claim for uncompensated taking was not yet ripe for adjudication because, *inter alia,* until a final decision was rendered by the Planning Commission, the plaintiff could not establish that there had been a taking at all. In addition, the Court found that, even assuming that there had been a taking, until there was a

final decision by the Planning Commission, it was not possible to quantify the extent of the land owner's damage. 473 U.S., at 186-194, 105 S.Ct., at 3116-3120. Significantly, in *Williamson County,* this Court did not require, as did the Court of Appeals in Petitioner's case, that one who has knowledge of facts which may, *or may not,* prove an injury at some time in the future put the putative defendant on notice by filing his action and then having it stayed pending a final determination as to the existence and extent of the possible injury.

B. De Minimus Injury As A Cause Of Accrual

The Court of Appeals found, App., *infra*, 8a, that Petitioner's claims accrued in 1980 when he learned that Mitchell and O'Connor had in fact been paid for their testimony. The Court of Appeals reasoned that at that point, *even though his conviction had not yet been found unconstitutional*, Petitioner "learned of the *injury* giving rise to his claims". *Id.* The Court of Appeals' finding conflicts with *United v. Kubrick, supra,*, 444 U.S., at 122, 100 S.Ct., at 359, in which this Court held that even when a potential civil plaintiff has knowledge of the facts which may eventually give rise to a cause of action, where there is no discernible injury at the time or the apparent injury is *de minimus,* the plaintiff's claim does not accrue until he learns the extent of his injury. 2/

2/ In the Courts below, Petitioner analogized himself to one who has been "rear ended" in a car accident, but who has sustained no provable damage until much later when a whiplash injury manifests itself. While Respondents belittled this argument in the Courts below and the Court of Appeals did not address it, the analogy is apt. This Court has held in *Wilson v. Garcia,* 471 U.S. 261, 277-279, 105 S.Ct. 1938, 1947-1948 (1985) that Section 1983 actions, and so by analogy, *Bivens* claims, are subject to the statute of limitations for personal injuries in the forum state because such violations are most closely analogous to personal injuries.

C. Harmless Error As A Constitutional Cause Of Action

The Court of Appeals also found, App., *infra*, 5a-6a, that a cause of action such as the one Petitioner alleges, one based on the withholding of arguably exculpatory evidence, accrues either at the time of the withholding or when the criminal defendant learns of the withholding, even though at that time there was still a presumptively valid criminal conviction in place because there had not yet been a finding that the withholding had been material under the standard which this Court enunciated in *United States v. Bagley, supra*, 473 U.S. 667, 105 S.Ct. 3375, 97 L.Ed.2d 481. The Court of Appeals then went on to find, App., *infra*, 9a-10a, that a civil rights Plaintiff would have a cause of action against law enforcement officers such as Prins, Mitchell and O'Connor even if the withholding of evidence was eventually found by a habeas court to have been harmless. This finding is contrary to this Court's holding in *United States v. Bagley, supra*,, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) that failure to disclose information which is arguably exculpatory rises to the level of a Constitutional violation only if the withholding deprives the defendant of a fair trial. In addition to being in conflict with this Court's opinion in *Bagley*, one end result of the Court of Appeals' ruling is likely to be that, at least until the issue is further litigated, there is likely to be a rash of *Bivens* and Section 1983 actions filed based on the most *de minimus* or even frivolous claims of withheld evidence because, under the Court of Appeals' ruling, a compensable injury can arise even from completely immaterial withholding. 3/

3/ While the Respondents denied in the lower courts that the rule adopted by the Court of Appeals would result in clogging the federal courts with frivolous law suits, Petitioner's prediction that this will result from the Court of Appeals ruling is not [Footnote 3/ continued on page 11]

[Footnote 3/ continued from page 10:] without support. Leaving aside the fact that it would be anomalous to have one standard for reversal of a criminal conviction and a lesser standard for civil liability, the Court of Appeals' ruling will likely create a cottage industry for unscrupulous jailhouse lawyers, many of whom no doubt do quite well from themselves by spawning litigation for which they are paid in one way or another by fellow inmates. A quick check of Shepard's Citations shows that *United States v. Bagley, supra,* has been cited thousands of times since it was announced in 1985. Even allowing for multiple citations in the same case, this means at least hundreds of claims of withheld evidence. While the undersigned does not have current figures available as to the percentage of those claims which are eventually found to be meritorious, at one time about 3% of all Section 2255 Motions were successful. The percentage of successful *Brady / Bagley* claims would probably not differ much from that overall figure. Under the rule announced in this case, even a large percentage of the 97% of applicants alleging *Brady / Bagley* violations whose claims of withholding were found not to warrant reversal because the information withheld was immaterial would be entitled to at least nominal damages. Given the fact that figures supplied by the Administrative Office of the United States Courts show that in 1986, 1987, 1988, 1989 and 1990, respectively, 12,280, 13,046, 13,818, 14,898 and 15,760 post conviction actions attacking federal and state sentences were filed in the United States District Courts and 20,842, 23,716, 24,421, 25,957 and 25,992 prisoner civil rights cases were filed in the United States District Courts, it is reasonable to expect that a large number of civil rights claims will be filed seeking damages for withholding of information which was not sufficiently material to result in reversal of a conviction. As the Attorney General of the State of California said in his *amicus curia* brief in *United States v. Bagley*: "It has been California's experience that the significance of evidence looms larger in loss than in life. (*See, e.g., People v. Harris*, 133 Cal. Rptr. 352, 354.) ... Thus we know of cases where an investigating officer erroneously believed that a witness statement was incorporated in his report, when in fact it was not, ... *People v. Reyes*, 116 Cal. Rptr. 217, 226, or where negatives were overlooked, resulting in [footnote 3/ continued on page 12]

II

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH THE OPINIONS OF THOSE COURTS WHICH HAVE SQUARELY ADDRESSED THE ISSUE OF WHETHER A CIVIL RIGHTS CLAIM BASED ON AN UNCONSTITUTIONAL CONVICTION ACCRUES AT THE TIME THE PLAINTIFF FIRST LEARNS OF THE UNDERLYING FACTS OR ON THE DATE OF REVERSAL.

There are not many cases which squarely address the issue of whether a claim of the sort in issue here accrues at the time the plaintiff learns the underlying facts or at the time the conviction is reversed because, in recent years, plaintiffs seem to file their civil actions more or less concurrently with their habeas actions and the Courts have then stayed the civil action pending comple-

---

[Footnote 3/ continued from page 11:] photographs which were not printed (*People v. Harris*, 139 Cal. Rptr. 784, 788.)" If the Court of Appeals' ruling stands, defendants in criminal cases such as those described by the Attorney General of California will have causes of action which accrue when they learn of the withholding, regardless of whether they suffered actual injury in terms of violation of their Due Process rights. In addition, if the Court of Appeals' ruling stands, caution will require the defendants in such criminal cases to file their civil suits more or less concurrently with their habeas actions. The end result will be a substantial new body of case law on collateral estoppel brought about by large numbers of law enforcement officers defending the civil suits which the Court of Appeals' ruling will generate on the basis of the affirmative defense that the conviction in question was valid, so that the criminal defendant *cum* civil rights plaintiff is therefore collaterally estopped as to any claim of Constitutional violation.

tion of the habeas process. 4/ However, those Courts which have squarely addressed the issue of the point at which a cause of action based on an unconstitutional criminal conviction accrues have held that the cause of action accrues on the date of the last court decision invalidating the conviction.

In *Triplett v. Azordegan*, 478 F. Supp. 872, 875 (N.D. Iowa 1978), the District Court found that until the unconstitutionally obtained conviction which gave rise to the plaintiff's cause of action was reversed, the plaintiff's cause of action did not accrue because, so long as the plaintiff's presumptively valid criminal conviction stood, he could not pursue his claim even though he had known the facts which ultimately established in 1972 that his conviction had been unconstitutionally obtained as early as 1955. The District Court reasoned that unless and until the wrongfully obtained conviction was reversed, the plaintiff's damages could not be defined. It further reasoned that, because the findings in a prior criminal case are preclusive, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 157, 83 S.Ct. 554, 561 (1963), the plaintiff would have been estopped from asserting any claim prior to the reversal of his conviction. 5/

While involving a cause of action against a private party rather than one acting under color of law, the Eighth Circuit's opinion in *McNally v. Pulitzer Co.*, 532

4/ This is precisely what happened in *Young v. Kenny*, 887 F.2d 237 (9th Cir. 1989), the first Ninth Circuit case to squarely hold that such actions should be stayed rather than dismissed pending a decision in the habeas action. *Young v. Kenny* was decided after this case was filed.

5/ While other issues in *Triplett v. Azordegan* were appealed prior to its final resolution, the State did not appeal the issue of the date on which the claim accrued. The case eventually settled.

F.2d 69 (8th Cir. 1976), a case relied on by the District Court in *Triplett v. Azordegan*, reached a similar result to the one Petitioner urges here. In reaching that result, the Eighth Circuit reasoned that the plaintiff was collaterally estopped from alleging a violation of his Constitutional rights by the ruling on appeal in his criminal case conviction that his was valid and there had been no violation of his rights. The Court of Appeals further reasoned that where there had been no Constitutional violation, there was no compensable injury.

Reasoning that a cause of action based on an unconstitutionally obtained conviction did not accrue until the conviction was reversed because the plaintiff would be collaterally estopped from asserting an injury so long as the conviction stood, in *Prince v. Wallace*, 568 F.2d 1176, 1178 (5th Cir. 1978) the Fifth Circuit arrived at a result directly in conflict with the Ninth Circuit's finding in this case.

While not definitively deciding the issue, in *Jones v. Shankland*, 800 F.2d 77 (1986), the Sixth Circuit has also expressed doubt as to whether a cause of action based on an unconstitutionally obtained conviction could accrue before the conviction was reversed on appeal. 6/ In discussing the issue, the Court of Appeals said:

While the language of *Wolff* could be read as

6/ While the Court of Appeals did not address the issue because it concluded that the plaintiff's cause of action was time barred under any theory of accrual, in *Jones v. Shankland*, the District Court found that the plaintiff's cause of action accrued when this Court denied the State's Petition For Writ of Certiorari and the reversal of the plaintiff's conviction, which, incidentally, was overturned for a *Brady / Bagley* violation, became final. *Jones v. Shankland, supra*, 800 F.2d, at 79.

holding that a section 1983 suit for damages may be brought even if the damage claim is dependent upon the constitutionality of the prisoner's confinement, the Supreme Court recently acknowledged that it has not yet determined whether "a Federal District Court should abstain from deciding a section 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the conviction itself." *Tower v. Glover*, 467 U.S. 914, 923, 104 S.Ct. 2820, 2826 81 L.Ed.2d 758 (1984).

.... Our circuit in *Hadley*, concluding that the reasoning of *Preiser* combined with the policy considerations underlying *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), required the district court to stay its hand "where disposition of the damage action would involve a rule implying that a state conviction is or would be illegal," 753 F.2d at 516, and order as specific relief in that case the vacation of the district court's ruling that the plaintiff there had failed to state a claim upon which relief could be granted. At the same time, it affirmed the district court's dismissal of Hadley's claim, *without prejudice, however, to his opportunity to refile his claim under section 1983 if and when he established through a writ of habeas corpus that the was denied a constitutional right. The specific relief accorded in Hadley would normally raise some question whether, therefore, the accrual of a petitioner's cause of action for damages based upon constitutional violations which also affected his liberty, would be suspended during the entire time necessary to pursue the habeas action to a successful conclusion. ... There is support and logic for both views.*

Jones v. Shankland, supra, 800 F. 2d at 82 (emphasis added).

In a closely analogous situation, in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3rd Cir. 1985), *cert. denied*, 106 S.Ct. 183, the Third Circuit found that in the case of railway workers who had known for years that they had been exposed to asbestos fiber but who manifested no symptoms of their injury, their causes of action did not accrue until their injuries became apparent by their developing asbestoses. The Third Circuit reasoned that the plaintiffs had no cause of action, and thus no "claim" which could accrue, until the plaintiffs were able to demonstrate actual damage sufficient to entitle them to an award of damages. 758 F.2d at 942. The Third Circuit found that, rather than the plaintiffs having to merely have knowledge of certain facts which might, at some future time, conceivably prove a compensable injury, before a cause of action accrued the plaintiffs had to be able to prove a compensable injury. 7/

7/ While undoubtedly decided as a matter of state rather than federal law, on August 14, 1991 the South Dakota Supreme Court held in *Moeller v. State*, Westlaw number 154772, N.W.2d citation not yet assigned as this is written, that a cause of action based on a conviction which was illegally obtained in 1975 did not accrue, and the statute of limitations did not begin to run, until the conviction was vacated on *coram nobis* in 1987. Citing 46 Am.Jur.2d Judgments, Section 28, *Triplett v. Azordegan, supra*, 478 F.Supp. 872 and *Downton v. Vandemark*, 571 F.Supp. 40 (N.D. Ohio 1983), the South Dakota Supreme Court reasoned that, because the plaintiff's claim for damages was premised on the invalidity of his conviction, and because judgments are presumed valid until properly vacated, "the very foundation of [plaintiff's] claim was presumed absent." until the invalid conviction was vacated. The Court found, therefore, that the plaintiff's cause of action did not accrue until the date it had entered an Order vacating the invalid conviction.

III

IN FINDING THAT BAGLEY WAS NOT COLLATERALLY ESTOPPED FROM SUCCESSFULLY PROSECUTING HIS CIVIL RIGHTS CLAIM UNTIL HIS CRIMINAL CONVICTION WAS REVERSED, THE COURT OF APPEALS INCORRECTLY FOUND THAT THE ISSUE OF WHETHER BAGLEY'S CRIMINAL CONVICTION WAS UNCONSTITUTIONAL WAS DIFFERENT FROM THE ISSUE OF WHETHER THE INDIVIDUAL RESPONDENTS HAD VIOLATED HIS CONTITUTIONAL RIGHTS.

In rejecting Bagley's argument that he was collaterally estopped from successfully asserting his civil rights claim until his criminal conviction was reversed, the Court of Appeals held that:

> The issue in this case, however, is different from the issues presented in Bagley's criminal trial [(sic), actually a Section 2255 proceeding]. In the previous trial, Bagley attacked *the constitutionality of his conviction in light of the government's failure to disclose the requested impeachment evidence.* Here, Bagley challenges for the first time the conduct of O'Connor, Mitchell and Prins *as individuals,* on the ground that they violated his constitutional rights. *If these individuals violated Bagley's constitutional rights under color of state or federal law, his civil rights claim would not be totally defeated even if the officer's misconduct was harmless in his criminal trial.*

App., *infra,* 9a-10a (emphasis added).

Thus, the Court of Appeals held that Bagley would

not have been estopped by his later reversed criminal conviction from successfully prosecuting a civil rights action for violation of his Constitutional rights because there is a difference between the issue of whether a criminal defendant has been denied a fair trial by a law enforcement officer's withholding of evidence and the issue of whether the officer is liable for damages for that withholding. In short, as previously pointed out, the Court of Appeals' opinion effectively holds that Bagley would have had a compensable cause of action against Prins, Mitchell and O'Connor even had it ultimately been determined that the evidence withheld was immaterial and that Bagley's criminal conviction was, therefore, Constitutional. In addition to creating a compensable cause of action for what would be, at most, harmless error if it was error at all, the Court of Appeals opinion misapprehends the elements of collateral estoppel.

In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), this Court held that collateral estoppel applies to Section 1983 actions, so that by analogy, collateral estoppel would also apply to *Bivens* actions. This Court also held in *Allen v. McCurry*, that for purposes of defensive collateral estoppel, law enforcement officers are in privity with the government and that, because a civil rights plaintiff whose cause of action arises from the facts surrounding an arrest or search or criminal prosecution had sufficient incentive to fully litigate an issue in his criminal trial, the defendant *cum* plaintiff will be collaterally estopped by an adverse ruling in his criminal case on any issue which is essential to his civil rights claim which was previously decided in the criminal case. In *Caldeira v. County of Kauai*, 866 F.2d 1175, 1177-79 (9th Cir. 1989), the Ninth Circuit applied the rule of *Allen v. McCurry, supra*, to Section 1983 actions. In so doing, the Ninth Circuit stated that in civil rights actions preclusive effect would be given to prior

judgments in a criminal case where:

1.) The issue decided in the prior action was identical;

2.) There was a final judgment on the merits; and,

3.) The parties were identical or there was privity between the parties.

In its ruling on Bagley's original Motion To Vacate Sentence pursuant to 28 U.S.C. Section 2255, the District Court held in 1982 that there was no harm to Bagley's right to a fair trial from the withholding of evidence. If the Court assumes that a civil rights plaintiff alleging a cause of action for withheld evidence in his criminal trial must be able to show an actual injury, as it must do in order to avoid the spate of frivolous suits which will otherwise result from the Court of Appeals' ruling that one who alleges a cause of action based on withheld evidence has a compensable injury even in the absence of materiality to his criminal conviction, then it is obvious that the District Court's 1982 finding of harmless error collaterally estopped the Petitioner from successfully asserting a cause of action for withheld information until his conviction was reversed. Therefore, the Court of Appeals' opinion is contrary to the principles of collateral estoppel established in this Court's decision in *Allen v. McCurry, supra.*

IV

THE COURT OF APPEALS' OPINION FAILS TO STRIKE THE PROPER BALANCE BETWEEN THE COMPETING CONCERNS EMBODIED IN STATUTES OF LIMITATIONS, THE DOCTRINE OF COLLATERAL ESTOP-

PEL, THE GOAL OF JUDICIAL ECONOMY, AND THE FEDERAL INTEREST IN PERMIT TING PROSECUTION OF MERITORIOUS CIVIL RIGHTS CLAIMS.

The Court of Appeals' opinion has serious adverse implications for the concerns embodied in a number of different legislative and public policies because the opinion fails to strike the proper balance between those competing concerns. Areas of the law which will be adversely effected by the opinion include the concerns embodied in statutes of limitations, including the related principles of accrual and tolling, the policies underlying the doctrine of collateral estoppel, the goal - or perhaps in this day of ever more crowded dockets, the necessity - of judicial economy, and finally, the federal interest in permitting prosecution of meritorious civil rights claims.

While it is true that statutes of limitations are intended to prevent stale claims, if that rule were absolute, there would be no rules of accrual or discovery and all statutes of limitations would be absolute, so called "statutes of repose". 8/ The fact that the courts and the Congress and Legislatures have developed a rather large and complex body of statutory and case law dealing with accrual and discovery of injuries reflects the value judgment that a balancing of interests is appropriate in this area and that those who were unable to press their claims earlier because they did not know of their injury or were unable to show a compensable injury earlier should not be denied relief simply because their injury was one which could not be detected or proved earlier. If preventing stale claims were the sole consideration in applying

---

8/ As Judge Posner explained in *Johnson v. Sullivan,* 922 F.2d 346 (7th Cir. 1990), statutes of limitations are subject to a variety of exceptions, whereas "statutes of repose" are absolute and commence on a "time of the event" basis.

statutes of limitations, there would be no such concepts as "discovery", a concept which the Respondents and the Court of Appeals panel which decided this case accepted without question when arguing and deciding respectively, that Bagley's claim accrued in 1980.

As this Court has stated in *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980), citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975):

> "Any period of limitations . . . is understood fully *only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations in necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones.* In virtually all statutes of limitations the chronological length of the limitation is interrelated with provisions regarding tolling, revival and questions of application."

Tomanio, supra, 446 U.S., at 485, 100 S.C., at 1795 (emphasis added). Thus, had Petitioner been continuously incarcerated from the time he first learned of the facts underlying this claim in 1980 until his unconstitutional conviction was finally reversed in 1986, it is undisputable that under the rule of this Court's decision in *Hardin v. Straub*,___ U.S. ___, 109 S.Ct. 1998, ___ L.Ed.2d ___ (1989), the provisions of RCW 4.16.110, which tolls statutes of limitations for the imprisoned, would have been applicable to this action and the statute of limitations would not have begun to run on Petitioner's claim until he was released from jail. It is, therefore, clear

that considerations other than notice to potential defendants weigh heavily in the equation which was before the Court of Appeals in this case. This is so because, as this Court went on to explain in *Tomanio, supra:*

> . . most courts and legislatures have recognized that *there are factual circumstances which justify an exception to these strong policies of repose. []*

Tomanio, supra, 446 U.S. at 487-488, 100 S.Ct. at 1797.

In addition to the policy considerations inherent in the statute of limitations, including the many exceptions the policies of repose discussed above, another policy consideration in the equation before the Court of Appeals in this case was the doctrine of collateral estoppel. As this Court explained in *Allen v. McCurry, supra*, 449 U.S. 90, 94, 101 S.Ct.411, 415, 66 L.Ed.2d 308 (1980):

> "Collateral estoppel *relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions*, encourages reliance on adjudication. [authority]."

In short, the doctrine of collateral estoppel is quite similar in at least one respect to the doctrine of immunity. It encompasses the right not only to be free from liability in cases to which it is applicable, but also the right to be free from the burden and expense of litigation itself. If the Court of Appeals' opinion stands, then two purposes of collateral estoppel will essentially be defeated in cases such as this one where a presumptively valid conviction which disposed of a claim of Constitutional violation is still in place. If prospective civil rights plaintiffs are required to file their actions before completion of direct

appeals or habeas corpus actions attacking criminal convictions, then both the right to be free from litigation and judicial economy will be defeated. While the Court of Appeals' opinion was undoubtedly intended to benefit the class of defendants, primarily law enforcement officers, to which *McCurry v. Allen, supra,* accorded collateral estoppel on the basis of a criminal conviction, it will in fact have the opposite effect for the vast majority of law enforcement officers because they will, in many cases, no longer be protected from liability, or even from suit, by the presumptive validity of the convictions on which they could once rely. 9/

Another policy consideration which was involved in the equation before the Court of Appeals in this case is that of the federal interest in permitting litigation of meritorious civil rights claims. As this Court explained in *Hardin v. Straub, supra,* ___ U.S., at ___, 109 S.Ct., at 2002, note 10, there is a strong federal interest in

---

9/ The Court of Appeals' concern that Petitioner's theory of accrual will effectively abrogate statutes of limitations on civil rights claims blinks at reality. In addition to the fact that habeas corpus is subject to laches, it is inconceivable that a prisoner with a meritorious habeas claim would delay pressing that claim, and therefore remain in prison, in order to "sandbag" some future civil rights defendant by letting time pass so that memories will dim and documents will be lost. The concern that, in this case, Respondents CMC and Soo Lines have somehow been prejudiced by the passage of time while Petitioner litigated the habeas corpus issue because they had no knowledge of either the claim or the facts underlying it not only overstates any purported prejudice, it is also states no greater hardship than that experienced by many other defendants who are routinely subjected to claims which do not accrue for several years after the incident in question. The most obvious example which comes to mind is the many asbestos cases which have been held not to accrue until the Plaintiff can show a compensable injury. *See Schweitzer v. Consolidated Rail Corp., supra.*

allowing valid claims to be determined on their merits.

The final factor in the equation before the Court of Appeals in this case is that of judicial economy. In addition the prevention of vexatious or harassing lawsuits, judicial economy is recognized as one of the goals furthered by the doctrine of collateral estoppel. Judicial economy will be seriously damaged by the Court of Appeals' opinion in this case because, as demonstrated in footnote 3, *infra*, the Court of Appeals' opinion in this case not only creates a cause of action in cases in which there has been no actual Constitutional injury, it will permit the filing of many lawsuits which might otherwise never see the light of day because they would not accrue unless the plaintiff succeeded in reversing the criminal conviction which he alleges forms the basis of his cause of action. 10/

When all of the countervailing considerations inher-

10/ While the Court of Appeals suggested that courts can further judicial economy through the simple expedient of staying civil rights cases until any underlying criminal case is disposed of on habeas corpus, that approach will in large measure defeat one of the Court of Appeals' prime rationales for requiring early notice to putative defendants - the gathering of information while memories are fresh and documents are available. If that goal is to be served, then discovery will have to be permitted. It is not likely that Courts will permit discovery by a defendant while denying it to the plaintiff. Given the advantages of the more or less mandatory discovery permitted by the Federal Rules of Civil Procedure to a prisoner who was concurrently litigating a habeas action with the benefit of only the discretionary discovery permitted in habeas actions, it does not take a crystal ball to predict that any reasonably bright jailhouse lawyer would soon learn to concoct a "civil cause of action" to go with his habeas action in order to increase his discovery power. When the inmate's discovery attempts very predictably got out of

[Footnote 10/ continued on page 25]

ent in the competing policies underlying statutes of limitations, the doctrines of collateral estoppel, judicial economy and the federal interest in resolving meritorious civil rights claims on their merits are taken into consideration, it is obvious that the Court of Appeals accorded far too much weight to the policy of repose found in statutes of limitations and far too little weight to the other factors in the equation before it. Unless corrected by this Court, that error will do much to undermine the policies inherent in the other considerations in the equation, while at the same time failing to in any meaningful way further the policy of repose underlying statutes of limitations.

CONCLUSION

The Court of Appeals' opinion in this case is in conflict with controlling precedent from this Court because it does not take into account the requirements that a plaintiff have a discernible, quantifiable injury before he has a cause of action. Instead, the opinion creates a cause of action in cases where there has been no actual Constitutional injury. The opinion is in conflict with the opinions of other courts which have addressed the issue of when a cause of action based on allegations of an unconstitutional criminal conviction accrues. In addition, the Court of Appeals' opinion does serious injury to the doctrines of collateral estoppel, judicial economy and the federal interest in deciding meritorious civil rights claim on their merits. For all of the above stated reasons, the Court should grant the requested Writ of Certiorari to review the opinion of the Ninth Circuit Court of Appeals.

[Footnote 10/ continued from page 24:] hand, the Court would then find itself faced with motions to compel and the inevitable cross motions for protective orders. Any hope of judicial economy through the doctrine of collateral estoppel will be reduced to wishful thinking.

DATED this 30th day of September, 1991.

Respectfully submitted,

/S/ Martha M. McMinn

Martha M. McMinn
Shuminsky, Shuminsky & Molstad
Attorneys for Petitioner Bagley
224 Davidson Building
Sioux City, IA 51101
Phone: (712) 255-8036

CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) copies of the above and foregoing on counsel for the opposing party by depositing same in the United Stats mail, with postage prepaid, addressed to:

Office of the Solicitor General
U. S. Department of Justice
Washington, D.C. 20530

and:

Mr. James E. Lobsenz
Attorney At Law
2300 Columbia Center
701 Fifth Avenue
Seattle, WA 98104

and:

Mr. James C. Fowler
Attorney At Law
Graham & Dunn
34th Floor, Rainier Bank Tower
1301 Fifth Avenue
Seattle, WA 98101-2653

DATED this 30th day of September, 1991.

/S/ Martha M. McMinn
Martha M. McMinn

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89- 35870
CV-88-1062-WLD

HUGHES ANDERSON BAGLEY, JR.,
Plaintiff-Appellant,

v.

CMC REAL ESTATE CORPORATION aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; NORMAN W. PRINS,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Washington
William L. Dwyer, District Judge, Presiding
Argued and Submitted
August 6, 1990 Seattle, Washington
[Filed January 22, 1991]

Before: THOMAS TANG, DOROTHY W. NELSON and WILLIAM C. CANBY, JR., *Circuit Judges.*
Opinion by Judge Canby
OPINION CANBY, *Circuit Judge:*

Hughes Bagley appeals the district court's order

granting judgment on the pleadings to all defendants in his civil rights action filed pursuant to 42 U.S.C. sections 1983 and 1985 and *Bivens v. Six Unnamed Narcotics Agents*, 403 U.S. 388 (1971). Bagley challenges only the district court's rulings that his section 1983 claim was barred by the statute of limitations and that he failed to state a cause of action under section 1985. We affirm.

BACKGROUND

Defendants James O'Connor and Donald Mitchell were state law enforcement officers also employed as security officers by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee Road"). Defendant Norman Prins is an agent for the Bureau of Alcohol, Tobacco and Firearms ("BATF"). Defendants CMC Real Estate Corp. ("CMC") and the Soo Line Railroad ("Soo") are successors in interest to the Milwaukee Road, having been created pursuant to Milwaukee Road's reorganization proceedings.

Between April and June 1977, O'Connor and Mitchell, with the approval of the Milwaukee Road, assisted Prins in an undercover investigation of Bagley. As a result of this investigation, Bagley was indicted on 15 counts of violating federal narcotics and firearms statutes. O'Connor and Mitchell were the government's two principal witnesses. Prior to his trial, Bagley filed a discovery motion requesting that the government disclose the names of all its witnesses and any inducements made to them in exchange for their testimony. In response, the government provided affidavits from O'Connor and Mitchell, each of whom stated that he had neither received nor expected compensation for his services. In fact, however, Prins had informed O'Connor and Mitchell that he would pay them "expense money" in exchange for their investigatory services. Moreover,

O'Connor and Mitchell had entered a written agreement with the BATF pursuant to which they received compensation for their assistance in the investigation.

At trial, O'Connor and Mitchell testified about both the firearms and the narcotics charges. The court found Bagley guilty on the narcotics charges, but not guilty on the firearms charges, and sentenced him to six months in prison and five years probation.

In May 1980, while in prison on other charges, Bagley filed requests for information pursuant to the Freedom of Information Act and the Privacy Act of 1974, 5 U.S.C. sections 552 and 552a. Through this inquiry, he learned that O'Connor and Mitchell had received compensation for their assistance in the investigation. In 1982 [sic - actually 1980] Bagley filed a motion under 28 U.S.C. section 2255 to vacate his narcotics conviction. On appeal of the denial of that motion, we reversed Bagley's conviction, holding that the government's failure to provide the requested information restricted Bagley's right to a fair trial. *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983). The Supreme Court reversed and remanded the case "for a determination whether there [was] a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different." *United States v. Bagley*, 473 U.S. 667, 684 (1985). On September 2, 1986, we found that the government's failure to disclose material impeachment evidence undermined confidence in the outcome of the trial and reversed Bagley's 1977 conviction. *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986).

Bagley filed the present action on August 18, 1988. The complaint alleged that Prins, O'Connor and Mitchell conspired to violate Bagley's constitutional rights to due

process and to confront witnesses against him. Bagley sought damages in excess of $100 million for his wrongful conviction and imprisonment, and the deprivations that accompanied that imprisonment.

Mitchell and Prins moved for judgment on the pleadings, asserting that this action is barred by the statute of limitations and that the complaint fails to state a prima facie case under Section 1985. 1/ In addition, Mitchell filed a motion for summary judgment asserting that the *Brady* claim raised in the complaint is inappliicable to him. Magistrate John L. Weinberg issued a Report and Recommendation in which he concluded that judgment on the pleadings should be granted for all defendants. He determined that the statute of limitations on the section 1983 and *Bivens* claims was three years, Wash. Rev. Code section 4.16.080(2); that Bagley's cause of action accrued in May of 1980; that the statute of limitations was tolled until Bagley was released from prison in 1982; that the pendency of Bagley's habeas corpus proceedings did not toll the statute of limitations or delay accrual of Bagley's claims; and that the claims became barred by limitations in 1985. The Magistrate also concluded that Bagley's section 1985 claim should be dismissed because the statute of limitations had expired and because Bagley failed to allege that he is a member of a protected class. Given this recommendation, the Magistrate did not rule on Mitchell's Motion for Summary Judgment. The district court adopted the Magistrate's Report and Recommendation in its entirety and granted all defendants judgment on the pleadings. Bagley now appeals.

STANDARD OF REVIEW

1/ Defendant O'Connor has not yet been served because Bagley has been unable to locate him.

We review *de novo* a judgment on the pleadings. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Judgment on the pleadings is proper when it is clearly established that there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* We accept all allegations of fact by the party opposing the motion as true, and construe those allegations in the light most favorable to that party. *Id.*

DISCUSSION

A. Statute of Limitations

42 U.S.C. section 1983 does not contain its own statute of limitations. Consequently, we apply the statute of limitations for an analogous cause of action under Washington state law. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). We have held that the appropriate statute of limitations in a section 1983 action is the three-year limitation of Wash. Rev. Code section 4.16.080(2). *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981). We have also held that this section applies to *Bivens* claims arising in Washington. *See Johnson v. Horne*, 875 F.2d 1415, 1424 (9th Cir. 1989).

The dispute here is whether Bagley's claim accrued in 1980 when he first learned that O'Connor and Mitchell had in fact been promised compensation for their participation in the investigation, or in 1986 when Bagley's conviction was finally put to rest. Bagley argues that because he had no cognizable, compensable injury until his unconstitutional 1977 conviction was finally reversed in 1986, his cause of action did not accrue until that time. There is some appeal to this argument. Nevertheless, precedent compels us to reject this theory.

Federal law determines when a cause of action

accrues and the statute of limitations begins to run for a section 1983 claim. *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). A federal claim accrues when the plaintiff "'knows or has reason to know of the injury which is the basis of the action.'" *Id.* (quoting *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1 141, 143 (9th Cir. 1983)). The Second Circuit, addressing an issue very similar to the one before us here, held that a plaintiff's section 1983 action accrues when he is incarcerated following a deprivation of his constitutional rights at trial. The court further held that the statute of limitations on that action begins to run upon incarceration notwithstanding the pendency of further state court proceedings. The court concluded, therefore, that the civil rights action should be stayed, rather than dismissed, in order to preserve it through the termination of the state court appeal. *See Mack v. Varelas*, 835 F.2d 995, 1000 (2d Cir. 1987). 2/

2/ There is also an analogous case from the Eastern District of Pennsylvania. In *Drum v. Nasuti*, 648 F. Supp. 888 (E.D. Pa. 1986), *affd*, 831 F.2d 286 (3d Cir. 1987), the court dismissed a section 1983 action because the statute of limitations expired during the pendency of the plaintiff's criminal appeals. The plaintiff in *Drum* filed a section 1983 action alleging that the defendants had committed perjury in his trial. The court, using the same standard for determining the accrual date for a cause of action as this court uses, held that the claim accrued at the time of trial when the plaintiff knew that the defendant had committed perjury. Addressing an argument similar to that made by Bagley, the court stated:

> . . . I must reject plaintiff's argument that his claim was not ripe until the Court of Appeals denied his appeal from his criminal contempt conviction .. [T]he last act which Drum complains of causing his injury would have from [defendant's] testimony of the conspiracy he

[Footnote 2/ continued of page 7]

Other circuits, as well as our own, have implicitly held that habeas corpus proceedings do not delay accrual of section 1983 claims. In *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990), for instance, the plaintiff filed a section 1983 action alleging that Washington state officials had unconstitutionally failed to apply good time credits to his prison sentence. The district court dismissed the complaint, holding that a habeas corpus petition, rather than a civil rights suit, was the appropriate procedure for challenging the length of the prison sentence. We reversed and ordered that the section 1983 action be stayed, not dismissed. until the plaintiff had exhausted his state remedies. We reasoned:

> Dismissal ... could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement. Exhaustion of state remedies is a process that may take years to complete; it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim. Accordingly, district courts in some circuits stay, rather

---

[Footnote 2 continued from page 6]: from [defendant's] testimony of the when he "knew" of the conspiracy he claims. It was then that the statute of limitations accrued. *Id.* at 903 (emphasis in original).

The court also rejected an argument that the criminal appeal tolled the statute of limitations:

> Nor can plaintiff argue that the reason he failed to file his section 1983 action was that the same issues were pending in another proceeding. [citations omitted]. Rather, in such a situation the Court would stay the civil rights proceeding until the criminal proceedings had run their course.... Thus, the statute of limitations ... bars plaintiff's claims.

Id. at 903-04

than dismiss section 1983 complaints in this posture. [citations omitted]. This is a wise policy; . . *Id.* at 878. Thus, we necessarily contemplated that the civil rights claim had accrued and the limitations period had begun to run despite the pendency of a habeas corpus action. *See also, Offet v. Solem*, 823 F.2d 1256, 1258 n.2 (8th Cir. 1987); *Spina v. Aaron*, 821 F.2d 1126, 1128-29 (5th Cir. 1987); *Bailey v. Ness*, 733 F.2d 279, 283 (3d Cir. 1984); *Richardson v. Fleming*, 651 F.2d 366, 375 (5th Cir. 1981); *Conner v. Pickett*, 552 F.2d 585, 587 & n.1 (5th Cir. 1977). 3/ Moreover, there appear to be no cases holding that a civil rights claim does not accrue until habeas corpus proceedings have ended.

In view of all of this precedent, we make explicit the implicit ruling of *Young*, and hold that Bagley's section 1983 and *Bivens* actions accrued for statute of limitations purposes when he first learned of the injury giving rise to his claims, and not at the completion of his habeas corpus proceeding.

This holding is consistent with the policy underlying statutes of limitations. "Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to

---

3/ In a different but somewhat analogous context, the Supreme Court held that commencement of agency proceedings under Title VII, 42 U.S.C. sections 2000e, *et seq.*, did not toll the limitations period for a claim brought under 42 U.S.C. section 1981 challenging the same conduct. The Court suggested as a possible solution "that the plaintiff in his section 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed." *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975).

prosecute them.' " *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (*quoting Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). Bagley knew of his claim eight years before he filed it. During that time, none of the defendants knew that Bagley contemplated bringing a claim against them and neither CMC nor Soo, as successors to the Milwaukee Road, had any knowledge of the facts giving rise to the claim. The defendants could take no steps to preserve evidence; the likelihood of their being prejudiced by the delay is great.

Bagley argues that it will aid judicial economy to forestall the filing of civil rights actions until completion of habeas proceedings; if the petitioner is unsuccessful in habeas, he will not file the civil rights claim. The argument is not without appeal, but the price of delay is too high. The judiciary can economize its resources by staying the civil rights action until habeas proceedings are complete. Moreover, Bagley's approach might extend limitations indefinitely, since habeas petitions are free of limitations.

We conclude, then, that Bagley's civil rights claims accrued in May 1980, when he learned of his injury. The statute was tolled, however, because the claims accrued while he was in prison, *see* Wash. Rev. Code section 4.16.190. but limitations began to run on July 9, 1982 upon his release. Thus, Bagley had until July 9, 1985 to bring this action. 4/ Bagley missed this deadline so his civil rights claims are now time barred.

4/ In 1984, Bagley was again imprisoned upon his conviction in Iowa state court for violating marijuana laws. Under Washington law, Bagley's return to prison did not "retoll" the statute. Once the statute begins to run, no subsequent disability will toll it. *See Pedersen v. Dept. of Transportation*, 43 Wash. App. 413, 422, 717 P.2d 773 (1986).

B. Collateral Estoppel

The district court originally held that the government's failure to disclose that O'Connor and Mitchell had been compensated for their efforts in the investigation was harmless error. Bagley claims that he could not possibly have brought his civil rights action before his conviction was reversed because he was collaterally estopped by this harmless error ruling from claiming that the defendants here had violated his constitutional rights. We disagree. A plaintiff may be estopped from bringing a civil action to challenge an issue which was "distinctly put in issue and directly determined" in a previous criminal action. *Emich Motors Corp v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976). The issue in this case, however, is different from the issues presented in Bagley's criminal trial. In the previous trial, Bagley attacked the constitutionality of his conviction in light of the government's failure to disclose the requested evidence. Here, Bagley challenges for the first time the conduct of O'Connor, Mitchell and Prins as individuals, on the ground that they violated his constitutional rights. If these individuals violated Bagley's constitutional rights under color of state or federal law, his civil rights claim would not be totally defeated even if the officer's misconduct was harmless in his criminal trial. In any event, Bagley could have filed his civil rights action within the limitations period and then asked the district court to stay that action pending the outcome of his habeas petition. Once his conviction was reversed, there could have been no collateral estoppel effect of any kind on his civil rights claims.

C. The Section 1985(2) Claim

Bagley argues further that the district court erred in

rejecting his claim under 42 U.S.C. section 1985(2). One of the bases of the district court's ruling was Bagley's failure to allege the required class-based animus. Bagley recognizes that only members of a protected class can state a claim under section 1985(3). *See Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971). He suggests, however, that the Supreme Court held in *Kush v. Rutledge*, 460 U.S. 719, 724-727 (1983), that a showing of class-based animus is not required to allege a claim under section 1985(2). This reliance on Kush is misplaced.

Section 1985(2) has two separate parts. 5/ *See*

5/ Section 1985 provides, in relevant part:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
[and]

. . .

(3) . . . do . . . any act in furtherance of the object of
[Footnote 5/ continued on page 12]

Kush, 460 U.S. at 724-25. The first part of the subsection addresses conspiracies "which deter by force, intimidation, or threat a party or witness in federal court." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1233 (7th Cir. 1984). The second part of the subsection creates a federal right of action for damages against conspiracies which obstruct the due course of justice in any State or Territory with intent to deny equal protection. *See Id.* It is clear from the complaint that Bagley is asserting a cause of action for conspiracy pursuant to the second part of section 1985(2). 6/ The Court in *Kush* held only that the first part of section 1985(2) does not require a showing of class-based animus. 460 U.S. at 726. It did not address whether the second part of 1985(2) requires such a showing. We have held, however, that "[a] cognizable claim under [the second part of section 1985(2)] requires an allegation of a class-based, invidiously discriminatory animus." *Phillips v. Bridgeworkers Local 118*, 556 F.2d

---

[Footnote 5/ continued from page 11]:

> such such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

6/ Paragraph 61 of the complaint states:

> The conspiracy to violate Plaintiff's Constitutional rights to Due Process and Confrontation of witnesses guaranteed by the Fifth And Sixth Amendments to the United States Constitution . . . is actionable as a violation of Title 42 U.S.C. section 1985, *which prohibits two or more persons from conspiring to hinder or obstruct or defeat the due course of justice with intent to deny any citizen equal protection of the laws.* (emphasis added).

939, 940-41 (9th Cir. 1977); *see also Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981).

Bagley failed to assert his membership in a protected class or any denial of equal protection. The district court properly rejected Bagley's section 1985 claim. 7/

AFFIRMED.

7/ The district court also reasoned that its ruling on this issue was proper because the second part of section 1985(2) applies only to actions in state court and because the claim was barred under the statute of limitations. Because of our disposition of this issue, we need not address these points here.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C88-1062WD

HUGHES ANDERSON BAGLEY,
Plaintiff,

v.

NORMAN PRINS, et al.,
Defendants.

ORDER GRANTING JUDGMENT ON THE PLEADINGS TO ALL DEFENDANTS
[filed November 1, 1989]

The court, having reviewed the complaint filed pursuant to 42 U.S.C. sections 1983 and 1985 and *Bivens v. Six Unnamed Narcotics Agents*, the motions for judgment on the pleadings by defendants Prins and Mitchell, the responses of the plaintiff, the supplemental filings of the parties, and the report and recommendation of United States Magistrate John L. Weinberg, does hereby find and ORDER:

(l) The court adopts the report and recommendation;
(2) The court grants judgment on the pleadings with prejudice, as to all defendants:
(3) The stay which was entered as to defendants Soo

Lines and CMC Realty is VACATED, as moot; and

(4) The motions for an extension of deadlines, and for summary judgment, submitted by defendant Mitchell, are STRICKEN, as moot; and

(5) The Clerk is directed to send copies of this order to the plaintiff and to counsel for all defendants.

DATED this 1st day of November, 1989.

/s_____
William L. Dwyer
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C88-1062WD

HUGHES ANDERSON BAGLEY, Plaintiff,

v.

NORMAN PRINS, et al.,
Defendants.

REPORT AND RECOMMENDATION
[Filed September 12, 1989]

BACKGROUND

The plaintiff filed this complaint on September 12, 1988 [sic], pursuant to 42 U.S.C. sections 1983 and 1985 and *Bivens v. Six Unnamed Narcotics Agents*, 403 U.S. 388 (1971). The defendants include Norman Prins, an agent with the Federal Bureau of Alcohol, Tobacco and Firearms; James O'Connor and Donald Mitchell, who were employed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Co. at the time of the incidents giving rise to this complaint; and two companies, CMC Real Estate Corporation and Soo Line Railroad, which are the successor corporations to the Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

The gravamen of the complaint is that Prins, O'Connor and Mitchell conspired to violate plaintiff's constitutional rights to due process and confrontation of witnesses. The plaintiff asserts the defendants' actions resulted in plaintiff's arrest and conviction on December 23, 1977 for two felony counts of distribution of a controlled substance. He was sentenced to six months in prison and five years' probation. He was imprisoned from January 20, 1978 until mid-June 1978. He remained on probation until March 30, 1979, when he was arrested for parole violations. In May 1979, he was charged with multiple counts of firearms violations. He was convicted of being a felon in possession and of selling firearms, and he was again imprisoned. He was released on parole on July 9, 1982. In January 1984, Bagley was arrested by Iowa state authorities for violation of marijuana laws, and a federal parole violation warrant was lodged as a detainer. On April 5, 1984, he was indicted in the Northern District of Iowa on federal firearms charges. He was convicted of the Iowa state charges on November 8, 1984. As of August 1988, the plaintiff had again been released; his filings in this case indicate a non-prison address.

On September 30, 1986, the United States Court of Appeals for the Ninth Circuit vacated plaintiff's 1977 conviction for distribution of illegal drugs in *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). The court held that the government's failure to disclose to the defendant that Mitchell and O'Connor had been paid by the Bureau of Alcohol, Tobacco, and Firearms to conduct an investigation of Bagley had deprived Bagley of a fair trial. This decision came as the result of Bagley having filed a 28 U.S.C. section 2255 motion in which he "argued that the government violated his due process rights under *Brady* by failing to produce evidence material to the witnesses' credibility." 798 F.2d at 1299. The court concluded that

"the government's *Brady* error undermines confidence in the outcome of Bagley's trial and requires reversal of his conviction." 798 F.2d at 1302.

Thus, in his section 2255 motion, the plaintiff attacked the government's role in his conviction. In this 42 U.S.C. section 1983 complaint, he attacks the role of the three men who participated in the investigation which led to his 1977 arrest. He asserts that, as a result of the alleged conspiracy among and failure to disclose by these defendants, he suffered deprivation of numerous constitutional rights and other damages in conjunction with his 1977 conviction, in addition to numerous wrongs which allegedly flowed from his subsequent arrests and convictions.

After this complaint was filed, the court granted the motion of defendants CMC and Soo Line for a stay Of proceedings pending determination of their motion for injunctive relief which is pending in the Eastern Division of the United States District Court for the Northern District of Illinois. Docket #17.

Defendants Prins and Mitchell have submitted separate motions for judgment on the pleadings. 1/ For purposes of judicial economy, this report and recommendation will address both motions. The plaintiff has responded to both motions, incorporating his response to defendant Prins' motion into his response to defendant Mitchell's motion. Both motions assert two common grounds: (1) this action is barred by the applicable statute of limitations; (2) the complaint fails to state a prima facie case under section 1985. In addition, Mitchell asserts that the *Brady* claim raised in the complaint is not

---

1/ Defendant O'Connor has not yet been served because the plaintiff has been unable to locate him. Therefore, he is not a party to this lawsuit at this time.

applicable to Mitchell. Prins presents three additional arguments: there is no showing of "under color of state law" as required for a section 1983 action; the plaintiff has failed to adequately plead a conspiracy pursuant to section 1985; and Prins is not subject to this suit because he is entitled to qualified immunity.

As discussed below, I recommend that these motions for judgment on the pleadings be granted. The plaintiff's claims are barred by the applicable statute of limitations. Furthermore, the complaint fails to state a cause of action pursuant to 42 U.S.C. section 1985. Because I conclude the defendants are entitled to judgment on these bases, this report and recommendation will not address the remaining issues raised by the defendants.

Because the same considerations apply equally to plaintiffs claims against the two corporate defendants, I recommend entry of judgment in their favor as well, despite the fact that these defendants have not yet filed similar motions.

DISCUSSION

Statute of Limitations

42 U.S.C. 1983 does not establish a statute of limitations or a set of tolling rules applicable to actions brought in federal court for violations of its provisions. Therefore, in considering statute of limitations issues in section 1983 claims, this court must apply the Washington statutes of limitations governing an analogous cause of action. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). The parties agree that the applicable statute of limitations in this section 1983 claim is the 3-year limitation of RCW section 4.16.080(2). *See, Owens*

v. Okure, 57 U.S.L.W. 4065 (1989); *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981). Furthermore, the United States Court of Appeals for the Ninth Circuit recently held that RCW 4.16.080(2) also applies to *Bivens* claims arising in Washington. *Johnson v. Horne*, 875 F.2d 1415, 1424 (9th cir. 1989).

When federal courts "borrow" state limitations provisions, they must also enforce coordinate state tolling rules which are not inconsistent with federal policy. *Tomanio*, 446 U.S. at 484-85; *Hardin v. Straub*, 57 U.S.L.W. 4554 (1989).

However, federal law determines when a cause of action accrues and the statute of limitations begins running for a section 1983 claim. *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). A federal claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Id. (quoting Trotter v. International Longshoremen's and Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983)). The accrual of civil conspiracies in this circuit is determined in accordance with the last overt act doctrine. *Gibson v. U.S.*, 781 F.2d 1334, 1340 (9th Cir. 1986). Under that doctrine, "'[i]njury and damage in a civil conspiracy action flow from the overt acts, not from the mere continuance of a conspiracy.'" *Id. (quoting Kadar Corp. v. Milbury*, 549 F.2d 230, 234 (1st Cir. 1977)).

The defendants assert this cause of action accrued in May of 1980. It was then the plaintiff learned through responses to his Freedom of Information Act request that the sworn statements of defendants Mitchell and O'Connor, made in defendant Prins' presence and disclaiming any reward or expectation of reward by Mitchell and O'Connor for their participation in Prins'

investigation of the plaintiff, were false. *See*, Complaint, paragraph 56; Prins' Motion for Judgment on the Pleadings, at 2; Mitchell's Motion for Judgment on the Pleadings, at 2-4.

The plaintiff responds that his cause of action did not accrue until his 1977 conviction was reversed in September 1986, and thus is not time-barred. The plaintiff reasons that the statute of limitations was tolled, pursuant to the "discovery rule," because he could not have discovered the cause and manifest injury until the courts had rendered a final judgment on his 1977 conviction. As plaintiff states, "[i]n this case, while plaintiff became aware of Defendants' tortious conduct in May, 1980, he had no discernible injury until the Ninth Circuit Court of Appeals finally reversed his 1977 conviction in September, 1986." Plaintiff's Response to Prins' Motion for Judgment on the Pleadings, at 5. Plaintiff further asserts he would have been estopped from bringing these claims while his section 2255 motion was pending. Finally, plaintiff asserts the statute of limitations was tolled because he was in prison at the time the cause of action accrued.

The court should find that the statute of limitations was not tolled because of the pendency of plaintiff's section 2255 motion, that plaintiff was not estopped from bringing his section 1983 claim prior to September 1986, and that the plaintiff's incarceration period tolled the statute of limitations only until he was paroled in July, 1982. The applicable statute of limitations in this case, as to plaintiff's *Bivens*, 42 U.S.C. section 1983 and 42 U.S.C. section 1985 claims is three years. Therefore, the plaintiff's claims are time-barred.

The purpose of statutes of limitations is to provide fairness to defendants while preserving a reasonable

time for a plaintiff to present his claim. *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979); *Davis v. U.S.*, 642 F.2d 328, 330-31 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). As the *Kubrick* Court stated, at 117, "[Statutes of limitations] represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them." (quoting *Railroad Telegraphers v. Railroad Express Agency*, 321 U.S. 342, 349 (1944)).

In this case, the plaintiff admits that he knew in May 1980 that the individual defendants' sworn statements were false. Thus, although he did not know of the alleged violation at the time of the event (1977), he had full knowledge of the defendants' acts in 1980. In addition, he knew the consequences of the defendants' involvement: that he was investigated, indicted, arrested, tried, convicted and imprisoned based at least to some extent on their participation in his case. Thus, he knew in 1980 that he had sustained harm from the allegedly tortious act. Plaintiff makes no argument that the alleged civil conspiracy occurred later than 1977, or that it was continued past that year.

As the plaintiff points out, he could not know *all* the ramifications of the defendants' actions for some time after 1980, since his 1977 conviction affected his litigation pursuant to 28 U.S.C. section 2255 to vacate, set aside, or correct his conviction and that litigation was not fully resolved until September 1986. Also, plaintiff's asserts that his 1977 conviction affected his sentences for his subsequent conviction in 1979 and his 1986 [sic] parole violation charge. However, if the court adopts plaintiff's approach and analogizes these section 1983 and section 1985 claims to personal injury tort claims, then the general rule regarding accrual of a cause of action is that

a cause of action accrues when an injury or harm manifests itself. *Urie v. Thompson*, 337 U.S. 163 (1969). Even if the plaintiff later discovers that his injuries are more serious than he originally thought, his cause of action nevertheless accrues on the earlier date, when he realized that he had been harmed by a defendant's tortious act. *Hicks v. Hines, Inc. [sic]* , 826 F.2d 1543, 1544 (6th Cir. 1978). Thus, the plaintiff may not overcome a statute of limitations defense by arguing that he couldn't have known in 1980 *all* the harm that would flow from the defendants' acts.

The plaintiff further responds that, because his section 2255 motion was proceeding on appeal until 1986, he would have been estopped from bringing a section 1983 claim prior to September 1986. He cites case law which supports the proposition that a plaintiff may be estopped from bringing a section 1983 claim to challenge an issue which was distinctly put in issue and directly determined *in a preceding criminal action. See, e.g., Triplett v. Azordegan*, 478 F. Supp. 872, 875 (N.D. Iowa 1977) (conviction reversed on direct appeal [sic] based on involuntary confession, and court, considering later section 1983 related claim observed, "[t]he issue of voluntariness was sufficiently raised at the original trial to warrant estoppel until the court reversed the conviction in 1972"). The cases cited by plaintiff are inapposite to the facts here. One of the underlying issues in plaintiff's claim is the fact that he didn't know about the contract among the defendants at the time of his criminal trial, and thus he wasn't able to raise it to challenge the government.

The first time that the defendants' actions were distinctly put in issue in plaintiff's case was during the evidentiary hearing on his civil section 2255 motion. After the hearing, this court found that O'Connor and Mitchell

"did expect to receive from the United States some kind of compensation, over and above their expenses for their assistance though perhaps not for their testimony." *See*, Exhibit "B" to Prins' Motion for Judgment on the Pleadings, paragraph 1. Those findings were entered on May 12, 1982. *Id.* Thus, the basic issue upon which this complaint rests--whether or not there was an agreement for compensation among Prins, O'Connor and Mitchell--was decided favorably to the plaintiff's position, and none of the courts which addressed the plaintiff's section 2255 motion thereafter rejected that finding. *See, Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983), *rev'd, United States v. Bagley*, 473 U.S. 667 (1985); *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). Although the United States Court of Appeals for the Ninth Circuit disagreed with this court's conclusion regarding the materiality of the defendants' agreement, the focus of the inquiry throughout the plaintiff's section 2255 proceedings was on the constitutionality of the prosecutor's actions; the legality or wrongfulness of Prins, O'Connor, and Mitchell's actions was not directly at issue.

Other cases cited by the plaintiff are more narrowly limited in their holdings than he indicates. For example, he cites *Cline v. Brusett*, 661 F.2d 108 (9th Cir. 1982), which held that a claim for malicious prosecution does not accrue until the case has been terminated in favor of the accused. *Cline*, 661 F.2d at 110. The plaintiff's claims are not analogous to a common law malicious prosecution claim. 2/ He does not allege malice on the part of the defendants with regard to their participation in his

---

2/ The elements of malicious prosecution are: (1) the institution or continuation of [criminal] judicial proceedings dant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; and (6) the suffering of injury or damage as a result of the prosecution or proceeding. Restatement (Second) of Torts section 672 (1977).

conviction; he does not assert want of probable cause for the proceeding; and he does not allege that the content of the defendants' testimony was false in any regard except as to the withholding of information about their compensation for participating in the investigation.

The *Cline* court *did* find that other claims raised by the plaintiff, including a false imprisonment claim and a claim that he had been denied a fair trial because the prosecutor knowingly presented false evidence and perjured testimony to the jury, accrued on the date the plaintiff had been found guilty. As the court explained, "[t]hat is the latest date by which the appellant knew or had reason to know of the injuries which were the bases for those causes of action." *Id.*

Similarly, in *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), which the plaintiff cites, the court held that a claim for malicious prosecution does not accrue until the state prosecution terminates in the defendant's favor, because at common law the favorable termination was an element the accused had to establish in order to maintain his claim. However, the *Singleton* court dismissed the plaintiff's claims for assault and false arrest, holding that those claims accrued on the date of his arrest and were time-barred.

The plaintiff in *Singleton had also urged the court to find that the statute of limitations was tolled during the pendency of his criminal prosecution. The court refused to do so. The court observed that the applicable state law codified a number of common law tolling rules, but included none for tolling the time of filing during the pendency of a criminal prosecution against the plaintiff.* *Singleton*, 632 F.2d at 191. Also, the court found there was no inconsistency between the state's determination

that "the policy of repose underlying the statute of limitations outweighs any burden upon plaintiff arising from his being required to file a cause of action while he is subject to state prosecution" and the federal policy underlying section 1983. *Id.*

Finally, the plaintiff in *Singleton* raised another argument comparable to plaintiff's position here:

> Singleton contends that it would have been fruitless for him to have commenced his section 1983 action while the criminal prosecution was pending since there was a possibility that the federal district court would dismiss the section 1983 action on the ground that it would be inappropriate for a federal court to adjudicate constitutional issues which are relevant to the disposition of pending state criminal charges. These fears are unfounded. As suggested by the Fifth Circuit, the better course in situations where the district court feels compelled to abstain is to stay, rather than dismiss, the section 1983 action so that the plaintiff is protected from a possible statute of limitations bar to the section 1983 suit. *Conner v. Pickett*, 552 F.2d 585 (5th Cir. 1977) *(per curiam)* (remaining citations omitted).

Singleton, 632 F.2d at 193.

In the same manner, if the plaintiff had timely filed this section 1983 claim, it would have been appropriate for this court to stay that cause of action pending the outcome of his section 2255 motion.

For these reasons, the court should find that plaintiff's assertion that the statute of limitations was tolled during the pendency of his section 2255 motion is not

persuasive. As the court concluded in *Singleton*, 663 F.2d at 191, quoting *Tomanio*, 446 U.S. at 479, "plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their [section 1983] actions within three years."

Plaintiff also asserts the statute of limitations was tolled in his case because he was imprisoned at the time he learned about the individual defendants' agreement. Pursuant to RCW 4.16.110, the statute of limitations is tolled when a prospective plaintiff is imprisoned on a criminal charge or serving a sentence for a term less than life. Tolling occurs only if the person suffers the disability at the time the cause of action accrues. *Pedersen v. Dept. of Transportation*, 43 Wn. App. 413, 422 (1986). Also, under Washington law, once the statute of limitations begins to run, no subsequent disability will interrupt its operation. *Id.*

Based on the above, it is clear that the plaintiff cannot rely upon the statute of limitations having been tolled because of his imprisonment. He was in prison at the time this cause of action accrued, in May of 1980, following his 1979 conviction for being a felon in possession of firearms. However, he was released on parole on July 9, 1982. At that point, the statute of limitations began to run, and it expired during July 1985. This complaint was not filed until August 17, 1988. The fact that plaintiff was incarcerated again after his 1982 parole has no effect upon the running of the statute of limitations.

Therefore, plaintiff's claims regarding tolling because of a disability are also not persuasive. Accordingly, the court should conclude that plaintiff's section 1983 and *Bivens* claims are barred by the three-year statute of limitations of RCW 4.16.080(2), and defendants are

entitled to dismissal of these claims. Also, as is discussed below, the same statute bars plaintiff's section 1985 claims.

Section 1985 Claim

The complaint asserts a cause of action pursuant to 42 U.S.C. section 1985 for conspiracy to violate plaintiff's rights. The plaintiff did not specify in the complaint which subsection of section 1985 he is relying upon in this claim. The defendants premised their motions to dismiss the section 1985 claim upon the plaintiff's alleged failure to state a claim pursuant to section 1985(3). They assert that the plaintiff failed to establish the requisite showing of a conspiracy motivated by racial or otherwise class-based animus. *See, Griffin v. Breckenridge*, 403 U.S. 88, 100-102 (1971).

Plaintiff acknowledges that in order to state a claim under section 1985(3) he must establish membership in a protected class. Memorandum in Response to Prins' Motion for Judgment on the Pleadings, at 14. But he asserts that he is bringing this conspiracy claim under section 1985(2). That sub-section provides:

> Obstructing justice; intimidating party, witness, or jury
>
> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit

> juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Plaintiff, citing *Kush v. Rutledge*, 460 U.S. 719 (1983), asserts there is no required showing of membership in a protected class to allege a conspiracy in violation of section 1985(2). The court should find that an action pursuant to section 1985(2) also requires membership in a protected class; and the plaintiff's reliance on *Kush* is misplaced.

The *Kush* Court differentiated between the two portions of section 1985(2). The first part of subsection (2) addresses conspiracies "which deter by force, intimidation, or threat a party or witness in federal court." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1233 7th Cir. 1984). The allegations of the plaintiff's complaint do not state a cause of action under this part of subsection (2). Plaintiff does not suggest that witnesses or parties in his criminal trial were coerced to be absent from the trial or to commit perjury, or that parties or witnesses were threatened with harm for their participation in his trial.

The second part of subsection (2) creates a federal right of action for damages against conspiracies "which obstruct the due course of justice with intent to deny equal protection." *Id.*

Paragraph 61 of the complaint states:

> The conspiracy to violate Plaintiff's Constitutional rights to Due Process and Confrontation of witnesses guaranteed by the Fifth and Sixth Amendments to the United States Constitution ... is actionable as a violation of 42 U.S.C. section 1985, which prohibits two or more persons from conspiring to hinder or obstruct or defeat the due course of justice with *intent to deny any citizen equal Protection of the laws*. (emphasis added)

Although the plaintiff did not enumerate in his complaint or in his response to the motion to dismiss the exact part of section 1985 upon which he relies, the complaint and plaintiff's memorandum in opposition to the defendants' motions for judgment on the pleadings lead to the conclusion that plaintiff is asserting a cause of action for conspiracy pursuant to the second part of 42 U.S.C. section 1985(2). The language he uses in paragraph 61 of the complaint, where he sets forth this cause of action, is taken directly from the second part of section 1985(2).

The court has been unable to find case law which directly addresses the issue of whether the second part of section 1985(2) is applicable to a civil claim of conspiracy to obstruct justice in *federal* court, since the language of the statute refers to "the due course of justice in any State or Territory." 42 U.S.C. section 1985(2). However, even assuming that the plaintiff may rely upon this part of the statute, the complaint also fails to provide any basis for a finding of class-based animus.

Kush held only that there is no required showing of class-based animus on persons seeking to prove a violation of their rights under the *first* clause of section

1985(2). *Kush* 460 U.S. at 726. The same does not appear to be true as to the second clause. In *Griffin v. Breckenridge*, 403 U.S. at 102, the Court held that section 1985(3) applies to purely private conspiracies and explained the limitation on section 1985 actions as they relate to alleged deprivations of equal protection:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. (emphasis in original)

The *Kush* Court expressly declined to extend the *Griffin* language to all the remaining portions of section 1985. However, their primary reason for doing so was that "the textual basis for the 'class-based, invidiously discriminatory animus' requirement simply does not appear in that part [the first part of section 1985(2)] of the statute that applies to this case." *Kush*, 460 U.S. at 726.

The court should find the reasoning of *Kush* and the Court's interpretation of section 1985(3) is equally applicable to the second part of section 1985(2). Because an intent to deny equal protection of the laws - which is the "textual basis" referenced in *Kush* - does appear in the second part of section 1985(2), the plaintiff is required to establish his membership in a protected class in order to state a cause of action pursuant to this clause. There is no basis for the court, even upon a liberal interpretation of the complaint, to find that plaintiff can establish this element of a section 1985(2) or (3) Claim.

In addition, the court should conclude that plaintiff's section 1985 claims are time-barred. Although the court has found no case law expressly applying the Washington three-year statute of limitations of RCW 4.16.080(2) to section 1985 claims, the court should follow the guidelines of *Rose v. Rinaldi*, 654 F.2d at 547, and apply the applicable period of limitations under Washington law. *See, also, Johnson v. Railway Express*, 421 U.S. at 462.

Rose held that RCW 4.16.08(2) applies to section 1983 claims because the "catch-all three-year limitations period 'for any other injury to the person or rights of another' contained in RCW 4.16.080(2) furthers [the interest of the United States in preserving the spirit of section 1983 actions]." *Rose*, 654 F.2d at 547. The alternative statute which the court considered was RCW 4.16.130, which sets a two-year limit for "an action for relief not hereinbefore provided for." *Id.* The *Rose* court concluded RCW 4.16.080(2) was preferable because generally a longer statute will be used where there is uncertainty as to which limitations statute governs. *Id.*

Applying this reasoning to the present case leads to the conclusion that the three-year statute of limitations is applicable to plaintiff's section 1985 claims. For the reasons discussed above with regard to his section 1983 and *Bivens* claims, his section 1985 claims are also time-barred.

CONCLUSION AND RECOMMENDATION

For these reasons, I recommend that the court find this action is time-barred as to all plaintiff's claims, and that, in addition, plaintiff fails to state a cause of action pursuant to 42 U.S.C. section 1985. Accordingly, the complaint should be dismissed as to all the defendants.

The order staying the action as to defendants Soo Line and CMC Realty should be vacated, as moot. Defendant Mitchell's motions to extend the deadline for the filing of dispositive motions and completing discovery, and for summary judgment, should be stricken, as moot.

A proposed order accompanies this report and recommendation.

DATED this 12th day of September, 1989.

/s_____
John Weinberg
United States Magistrate

APPENDIX D

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 89-35870
DC NO. CV-88-1062WD

HUGHES ANDERSON BAGLEY, JR.,
Plaintiff-Appellant,

vs.

CMC REAL ESTATE CORPORATION, aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; NORMAN W. PRINS,
Defendants-Appellees.

ORDER
[Filed June 3, 1991]

BEFORE: TANG, NELSON AND CANBY, CIRCUIT JUDGES

The panel has voted unanimously to deny the petition for rehearinq and suggestion for rehearing en

banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

/s_____
William C. Canby, Jr.
United States Circuit Judge

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35870
CT/AG#: CV-88-1062-WLD

HUGHES ANDERSON BAGLEY, JR.
Plaintiff-Appellant

vs.

CMC REAL ESTATE CORPORATION, aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; NORMAN W. PRINS
Defendants - Appellees

APPEAL FROM the United States District Court for the Western District of Washington (Seattle) .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

Filed and entered January 22, 1991

ENTERED
ON DOCKET
JUL 2 1991

APPENDIX F

The Hon. William L. Dwyer/ Magistrate John L. Weinberg

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NO. C88-1062WD

HUGHES ANDERSON BAGLEY, JR.,
Plaintiff,
v.
NORMAN W. PRINS, JAMES P. O'CONNOR, DONALD E. MITCHELL, CMC REAL ESTATE CORP., and THE SOO LINE RAILROAD,
Defendants.

NOTICE OF APPEAL
[Filed November 27, 1989]

Plaintiff **HUGHES ANDERSON BAGLEY, JR.** hereby appeals to the Ninth Circuit Court of Appeals from the Order of the District Court adopting the Magistrate's Report and Recommendation granting judgment on the pleadings with prejudice to all Defendants entered in the

above captioned case on November 1, 1989.

DATED this 25th day of November, 1989.

/s -_____

Hughes Anderson Bagley, Jr.
Plaintiff Pro Se
P. 0. Box 3853
Sioux City, IA 51102

(2)

No. 91-762

In the Supreme Court of the United States

OCTOBER TERM, 1991

HUGHES ANDERSON BAGLEY, JR., PETITIONER

v.

CMC REAL ESTATE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT PRINS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

After petitioner was convicted for federal narcotics violations, he learned that, contrary to the information he had received in response to his pretrial discovery motion, two of the government's principal witnesses had received compensation for their assistance in the investigation that led to his indictment.

The question presented is whether petitioner's claims for damages under 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on the government's withholding of witness information accrued when he first learned of the witnesses' false statements or when his conviction was later reversed because the withholding of the information was found to be prejudicial error.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-762

HUGHES ANDERSON BAGLEY, JR., PETITIONER

v.

CMC REAL ESTATE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT PRINS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 923 F.2d 758. The decision of the district court adopting the report and recommendation of the magistrate (Pet. App. 16a-33a) is unreported. Pet. App. 14a-15a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on January 22, 1991. A petition for rehearing was denied on June 3, 1991 (Pet. App. 34a-35a). On September 4, 1991, Justice

O'Connor extended the time for filing a petition for a writ of certiorari to and including September 30, 1991, and the petition was filed on September 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1977, respondent Mitchell, a state law enforcement officer employed by respondent Chicago, Milwaukee, St. Paul & Pacific Railroad Company as a security officer, assisted respondent Prins, an agent for the Bureau of Alcohol, Tobacco and Firearms (BATF), in conducting an undercover investigation of petitioner. After a trial in which respondent Mitchell testified against him, petitioner was convicted in 1977 of violating federal narcotics laws. Pet. App. 2a-3a.

In response to petitioner's pretrial discovery motion, the government furnished petitioner with Mitchell's sworn statement that he had received no compensation for his assistance in connection with petitioner's prosecution. In May 1980, as a result of requests for information under the Freedom of Information Act and the Privacy Act of 1974, 5 U.S.C. 552, 552a, petitioner learned that Mitchell's sworn statements were false: respondent Mitchell had entered into a written agreement with the BATF to receive compensation for his assistance in the investigation. Pet. App. 3a.[1]

---

[1] James O'Connor also participated in the investigation that led to petitioner's 1977 conviction, and, like Mitchell, signed statements indicating that he had neither received nor expected to receive compensation for his services. Although petitioner named O'Connor as a defendant in this case, he was never able to locate O'Connor and, thus, was unable to

b. The district court denied petitioner's application under 28 U.S.C. 2255 to vacate his narcotics conviction, ruling that the government's withholding of the information concerning witness compensation was harmless error. The court of appeals reversed. Following a remand from this Court, see *United States* v. *Bagley*, 473 U.S. 667 (1985), the court of appeals, on September 2, 1986, again reversed petitioner's 1977 conviction, finding that the error was not harmless. *Bagley* v. *Lumpkin*, 798 F.2d 1297 (9th Cir. 1986).

2. a. On August 18, 1988, petitioner filed suit against respondents under 42 U.S.C. 1983 and 1985, and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they had conspired to violate his constitutional rights to due process and to confront the witnesses against him. He requested damages of $100,000,000. Pet. App. 3a-4a. Respondents Mitchell and Prins moved for judgment on the pleadings, arguing, *inter alia*, that the action was barred by the statute of limitations and that the complaint failed to state a cause of action under Section 1985. *Id.* at 4a.

A United States magistrate recommended that judgment be entered in favor of all respondents. He found that petitioner's claims had accrued in 1980, when he learned that respondent Mitchell's statements were false, and were therefore time-barred under the applicable three-year state statute of limitations. Pet. App. 27a. The magistrate rejected petitioner's argument that the statute of limitations was tolled during the pendency of his Section 2255 motion. He concluded, however, that because petitioner was

---

serve him. Pet. App. 2a-4a. Hence, O'Connor is not a party before this Court.

imprisoned at the time his cause of action accrued, the limitations period did not begin to run under state law until he was released. Pet. App. 27a. Since petitioner was paroled in 1982 and did not file suit until 1988, his claims were still time-barred.[2] *Ibid.* The district court subsequently adopted the magistrate's report and recommendation. *Id.* at 14a-15a.

b. The Ninth Circuit affirmed. Noting that "there appear to be no cases holding that a civil rights claim does not accrue until habeas corpus proceedings have ended," Pet. App. 8a, the appellate court held that petitioner's "section 1983 and *Bivens* actions accrued for statute of limitations purposes when he first learned of the injury giving rise to his claims, and not at the completion of his habeas corpus proceeding." *Ibid.* Agreeing with the district court, the appeals court concluded that, under state law, the limitations period was tolled while petitioner was imprisoned. Thus, it began to run on July 9, 1982 and ended on July 9, 1985. Since petitioner did not file suit until 1988, his suit was time-barred. *Id.* at 9a.

The court of appeals concluded that its holding was consistent with the purposes of statutes of limitations, observing that, while petitioner "knew of his claim eight years before he filed it," none of the respondents knew that petitioner "contemplated bringing a claim against them." Hence, respondents could "take no steps to preserve evidence" and "the likelihood of their being prejudiced by the delay is great." Pet. App. 9a. The court of appeals rejected petitioner's argument that judicial economy would be served by delaying the

---

[2] The magistrate also concluded that petitioner had failed to state a cause of action under 42 U.S.C. 1985. Pet. App. 31a. That ruling was affirmed on appeal, *id.* at 13a, and is not now before this Court. Pet. 5.

filing of civil rights complaints until after resolution of the habeas corpus proceedings, at which time the petitioner would know whether his conviction ultimately would stand. The court suggested that "[t]he judiciary can economize its resources by staying the civil rights action until habeas proceedings are complete." Moreover, the court explained, petitioner's approach "might extend limitations indefinitely, since habeas petitions are free of limitations." *Ibid.*

The court also rejected petitioner's argument that, until his conviction was ultimately reversed, he "could not possibly have brought his civil rights action" because he was collaterally estopped from claiming constitutional injury by the district court's ruling that the withholding of witness information was "harmless error." The court observed that the issue in the civil rights action was "different from the issues presented in [petitioner's] criminal trial," explaining that petitioner's civil rights claim "would not be totally defeated even if the officer's misconduct was harmless in his criminal trial." Pet. App. 10a. In any event, the court concluded, petitioner could have filed within the limitations period and then "asked the court to stay that action pending the outcome of his habeas petition." Upon reversal of his conviction there would be "no collateral estoppel effect." *Ibid.*

ARGUMENT

The court of appeals' decision is correct, and is fully consistent with the decisions of this Court and other courts of appeals. No further review is warranted.

1. State statutes of limitations and state tolling rules apply to actions brought under 42 U.S.C. 1983 unless "inconsistent with the federal policy underlying the cause of action under consideration," *Board of Regents* v. *Tomanio*, 446 U.S. 478, 485 (1980), but federal law governs when the cause of action accrues. *Norco Constr., Inc.* v. *King County*, 801 F.2d 1143 (9th Cir. 1986). The courts of appeals have applied the same rule to *Bivens* actions. See, *e.g.*, *Johnston* v. *Horne*, 875 F.2d 1415 (9th Cir. 1989); *Spina* v. *Aaron*, 821 F.2d 1126 (5th Cir. 1987).

As petitioner concedes (Pet. 8), "this Court has never squarely addressed the issue of whether a civil rights claim based on an unconstitutionally obtained criminal conviction can or does accrue before the conviction is vacated." However, this Court has implied that a defendant can maintain a civil rights action for damages stemming from his conviction and incarceration before exhausting all available avenues for challenging that conviction. In *Wolff* v. *McDonnell*, 418 U.S. 539, 554-555 (1974), this Court stated that a state prisoner's action for damages under Section 1983 based on the denial of good-time credits would be "properly before the District Court" while the prisoner was seeking restoration of good-time credits in parallel state proceedings. That statement is inconsistent with petitioner's position that a cause of action for deprivation of constitutional rights in connection with a criminal prosecution does not accrue

until such time as the conviction is reversed on review.[3]

Several courts of appeals have explicitly or implicitly rejected petitioner's position as well. See, *e.g.*, *Mack* v. *Varelas*, 835 F.2d 995, 1000 (2d Cir. 1987) (Section 1983 action against sheriff for failure to produce witness at trial accrued when defendant was incarcerated following conviction, not at completion of appellate and habeas proceedings); *Bailey* v. *Ness*, 733 F.2d 279, 280 (3d Cir. 1984) (rejecting the contention that "until such time as the state appellate court rule[s] that [the prosecuting attorney's] allegedly prejudicial conduct violated [the defendant's] constitutional rights," an action for damages under Section 1983 "could not be maintained" and "must be

---

[3] The Court had previously ruled, in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), that, when a state prisoner seeks only to void or shorten his term of imprisonment, his sole federal remedy is a writ of habeas corpus—which requires that he first seek relief in a state forum—rather than a suit under 42 U.S.C. 1983, which imposes no requirement that state remedies be exhausted. The Court stated in *Preiser*, however, that "[i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release." In that case, "habeas corpus is *not* an appropriate or available federal remedy." 411 U.S. at 494.

The clear implication of that statement is that a prisoner can maintain a cause of action under Section 1983 stemming from an unlawful conviction before exhausting all avenues for challenging the conviction. That premise also underlies the Court's observation in dictum in a later opinion that it had not yet resolved the question of whether "a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Tower* v. *Glover*, 467 U.S. 914, 923 (1984).

dismissed"); *Richardson* v. *Fleming*, 651 F.2d 366, 372-373 (5th Cir. 1981) (in suggesting that district court should stay civil rights action pending resolution of state and federal habeas proceedings, implying that statute of limitations might otherwise accrue and run before all avenues for review of criminal conviction were exhausted); *Young* v. *Kenny*, 907 F.2d 874, 876-878 (9th Cir. 1990) (reasoning that, because the limitations period on a section 1983 claim may expire before completion of all state appellate and federal habeas review, civil rights action should be stayed rather than dismissed pending those procedures), cert. denied, 111 S. Ct. 1090 (1991).

2. Contrary to petitioner's suggestion (Pet. 14), there is no conflict between the Fifth Circuit's decision in *Prince* v. *Wallace*, 568 F.2d 1176, 1178 (1978), and this case. In *Prince*, after the defendant's writ of habeas corpus was granted, he filed suit against the state prosecutor under 42 U.S.C. 1983 alleging a deprivation of his right to a speedy trial. In a per curiam opinion, the court of appeals upheld the dismissal of the action on the grounds both that the statute of limitations had expired and that the prosecutor enjoyed absolute immunity. In addressing the statute of limitations issue, the court stated that the cause of action did not accrue until the date that the State's application to this Court for reconsideration of the petition for writ of certiorari to review the grant of habeas relief was finally denied.

The court's statement on this issue was dictum: its decision to dismiss the action did not depend on whether the cause of action accrued at that point or earlier, since, in either event, the action was untimely. 568 F.2d at 1178. Moreover, the court's determination that the action was out of time was not essential to its decision; dismissal was also required because

the prosecutor had absolute immunity. Finally, the Fifth Circuit's discussion of accrual in *Prince* is at odds with its more recent decision in *Richardson* v. *Fleming*, 651 F.2d at 373, in which the court specifically instructed the district court on remand to have "due regard" for the state statute of limitations applicable to the defendant's Section 1983 claim in deciding whether to dismiss it without prejudice or to stay the action pending completion of state and federal review of his conviction. Those instructions are inconsistent with the position that a Section 1983 action stemming from a criminal prosecution does not accrue while the resulting conviction is still under review. See also *Conner* v. *Pickett*, 552 F.2d 585, 587 & n.1 (5th Cir. 1977) (suggesting that Section 1983 action be stayed rather than dismissed pending outcome of state criminal proceedings).[4]

---

[4] Petitioner also asserts (Pet. 13-14) that there is a conflict between the court of appeals' decision in this case and *McNally* v. *Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir.), cert. denied, 429 U.S. 855 (1976). In *McNally*, the court denied the defendant monetary relief under *Bivens* for an alleged violation of his right to a fair trial. The court did not address the statute of limitations or the accrual of the defendant's *Bivens* claim. It rested its decision, instead, on collateral estoppel principles, holding that the plaintiff could not relitigate the issue of the fairness of his trial in civil proceedings since that issue was decided adversely to him in his trial and appeal. This case does not present any issue of collateral estoppel, since, as the court of appeals recognized, "[o]nce [petitioner's] conviction was reversed, there could have been no collateral estoppel effect of any kind on his civil rights claims." Pet. App. 10a.

Relying on *Allen* v. *McCurry*, 449 U.S. 90 (1980), petitioner argues (Pet. 18-19) that, because a defendant would be collaterally estopped by an adverse ruling in his criminal case from proving the constitutional "injury" that would entitle

3. a. In arguing (Pet. 9) that the court of appeals' decision is inconsistent with *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979), petitioner mischaracterizes the Court's decision in that case. In *Kubrick*, this Court held that a malpractice claim does not accrue when a plaintiff becomes aware "that his injury was negligently inflicted," 444 U.S. at 120, but as soon as the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury." *Id.* at 122. Thus, contrary to petitioner's assertion (Pet. 9), the *Kubrick* Court did *not* distinguish between a potential malpractice plaintiff's "knowledge of the facts" underlying his cause of action, and knowledge of "the extent of his injury." Rather, the

---

him to relief under Section 1983 or *Bivens*, his cause of action does not exist—and hence does not accrue—unless, and until, his criminal conviction is overturned. Petitioner's argument is fallacious. Collateral estoppel is a *defense* to a cause of action; the availability of a collateral estoppel defense has no bearing on the existence of a cause of action and the timing of its accrual. Thus, assuming that collateral estoppel would apply, the resolution in criminal proceedings of issues bearing on an individual's claim of constitutional violation would, at most, affect the outcome of a subsequent civil rights action arising from those proceedings; it would not determine whether the defendant has alleged facts which, if proved, would amount to a deprivation of his constitutional rights. The proper response to the possibility that a non-final criminal conviction might have a collateral estoppel effect in a pending civil rights action (or that the civil adjudication might bar an inconsistent holding in a subsequent review of the conviction), see, *e.g.*, *Bailey* v. *Ness*, 733 F.2d at 281, is not dismissal of the action for failure to state a claim; some courts have stayed these lawsuits until the claimant's criminal conviction is no longer under review. See *id.* at 282-283; *Richardson* v. *Fleming*, 651 F.2d at 374-375; *Young* v. *Kenny*, 907 F.2d at 876-878.

Court recognized that a malpractice plaintiff will only have sufficient "knowledge of the facts" to bring an action when he becomes aware that he has suffered medical injury. At that point, "armed with the facts about the harm done to him," he can "protect himself by seeking advice in the medical and legal community" as to whether that injury was negligently inflicted. *Kubrick*, 444 U.S. at 123.

According to petitioner, *Kubrick* provides support for the proposition that his civil rights claims did not accrue until his conviction was reversed on collateral attack. Until the final disposition on review, he argues, a civil rights plaintiff cannot "know" whether he has suffered constitutional injury—and may ultimately be shown to have suffered none.

The fallacy of this argument is that it equates knowledge of "injury" as used in *Kubrick*—which denotes awareness of bodily harm—with knowledge of "legal injury" in the context of a civil rights action—that is, knowledge of whether the government official in fact violated petitioner's constitutional rights. As the opinion in *Kubrick* makes clear, that analogy is false. The Court in *Kubrick* distinguished plaintiff's awareness "that he has been hurt"—that is, that he suffered medical harm—from his knowledge that he "has been wronged"—that is, that the "injury" that he suffered was tortiously inflicted. The plaintiff's knowledge of his medical injury had nothing to do with whether he knew himself to be the victim of medical negligence. See 444 U.S. at 122, 124.

Similarly, in this case, it was not necessary for petitioner definitively to establish that the harm he suffered was of constitutional dimension—and that he would, for that reason, ultimately prevail on his legal claim—in order to be in a position to bring a

claim for the alleged violation. Petitioner was "armed with the facts about the harm done to him," 444 U.S. at 123, and possessed all information necessary to state his claim, when he learned, following his conviction, that evidence had been withheld. Petitioner was plainly aware of the "critical" facts in 1980: he knew that he had been unable adequately to cross-examine the government's witnesses because he had not known that they had been paid, and that he was subsequently convicted and incarcerated.

b. The court of appeals' decision is also not in conflict, as petitioner alleges (Pet. 8-9), with *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson*, this Court held that a land developer has no "taking" claim under the Fifth Amendment until the government makes a final decision regarding the developer's right to exploit the property. The Court explained that the Fifth Amendment is not actually violated until "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 193. *Williamson* is fully consistent with the court of appeals' decision in this case. The constitutional violation alleged by petitioner occurred when the "initial decisionmaker" decided to provide false information. Although the extent of the damages that might arise out of that injury was not definitively established, the constitutional violation was certainly "final" within the meaning of *Williamson* because, at that point, the government agents had committed the acts that petitioner claims violated his rights under the Constitution.

4. Because a motion for habeas corpus relief under 28 U.S.C. 2255 "may be made at any time," petitioner's argument as to when a cause of action ac-

crues would, in practice, result in an indefinite postponement of *Bivens* and Section 1983 claims without any notice to the potential defendants. This, in turn, would lead to the litigation of a great many claims after the relevant evidence and witnesses have disappeared. Such a result would utterly defeat the purpose of statutes of limitations, which is primarily to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. at 117; see also *Board of Regents* v. *Tomanio*, 446 U.S. at 487.

If, on the other hand, petitioner had brought his action in a timely fashion, respondents would have had notice of the claim pending against them. The court could have decided whether the claim was so patently frivolous as to warrant outright dismissal or whether the claim, even if not frivolous, was nevertheless subject to a dispositive defense independent of the existence of the conviction. See, *e.g.*, *Siegert* v. *Gilley*, 111 S. Ct. 1789 (1991) (no clearly established constitutional right); *Burns* v. *Reed*, 111 S. Ct. 1934 (1991) (state prosecutorial immunity); *Briscoe* v. *LaHue*, 460 U.S. 325 (1983) (witness immunity). In addition, the court could also consider the option of staying the proceedings or dismissing without prejudice to refiling upon completion of the habeas proceedings. See note 4, *supra*; see also *Bailey* v. *Ness*, 733 F.2d at 282-283; *Richardson* v. *Fleming*, 651 F.2d at 372-375; *Young* v. *Kenny*, 907 F.2d at 876-878. Petitioner's failure timely to file his claim precluded the district court from considering any of these options.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
MARY K. DOYLE
Attorneys

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45293

No. 91-762

IN THE
Supreme Court of the United States

October Term, 1991

HUGHES ANDERSON BAGLEY, JR.,

Petitioner-Plaintiff,

v.

NORMAN PRINS; JAMES P. O'CONNOR; DONALD E. MITCHELL; CMC REAL ESTATE CORP.; and THE SOO LINE RAILROAD,

Respondents-Defendants.

RESPONDENTS CMC REAL ESTATE CORPORATION AND THE SOO LINE RAILROAD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

January 8, 1992

James C. Fowler
Attorney of Record
GRAHAM & DUNN
1420 Fifth Avenue, 33rd Floor
Seattle, Washington 98101-2390
(206) 624-8300

Attorneys for Respondents

aBCD Legal Printers Seattle Washington

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE: **PAGE:**

SUPREME COURT CASES

COURT OF APPEALS CASES

DISTRICT COURT CASES

STATE COURT DECISIONS

STATUTES

SUMMARY

Bagley's Petition For Certiorari should be denied. None of the grounds for certiorari in Sup. Ct. R. 10 are present. The Ninth Circuit's decision is in accord with unanimous precedent from this Court and other jurisdictions. There is no conflict among jurisdictions that have addressed the issue in this case. Bagley's claim that the Ninth Circuit's decision conflicts with other precedent is based upon erroneous and strained interpretations of decisions which are unrelated to the issue in this matter. In addition, judicial economy and the policies behind statutes of limitations support the Ninth Circuit's decision.

This Brief responds to the specific points raised in Bagley's petition. For the Court's convenience, the arguments in this Brief are cross-referenced to the

portions of Bagley's brief to which they respond.

FACTS

A. Factual Background.

Defendants O'Connor and Mitchell are former security officers for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee Road"). (Complaint, copy attached in appendix, ¶ 17). Defendants CMC Real Estate Corp. ("CMC") and The Soo Line Railroad ("Soo") are successors in interest to the Milwaukee Road. (Complaint, ¶¶ 18-21). The Milwaukee Road entered reorganization proceedings in 1977, and emerged as the Soo and CMC in 1985. Defendant Prins is an agent for the Bureau of Alcohol, Tobacco and Firearms ("BATF"). (Complaint, ¶ 4).

In April 1977, Prins asked Mitchell and O'Connor to act as informants in an investigation of Bagley. Mitchell and

O'Connor agreed, and the Milwaukee Road approved. (Complaint, ¶¶ 23-25).

During the investigation, Mitchell and O'Connor had numerous contacts with Bagley. After each contact, they signed sworn declarations stating, among other things, that they did not expect any reward for aiding the Bagley investigation. (Complaint, ¶¶ 26, 27).

On May 3, 1977, Mitchell and O'Connor each signed a "Contract for Purchase of Information and Payment of Lump Sum Therefor" ("contracts"). Pursuant to these contracts, Mitchell and O'Connor each eventually received compensation for their work in the Bagley case. (Complaint, ¶¶ 29-31).

On May 11, 1977, Bagley was arrested for controlled substance and firearms violations. Prior to his trial, Bagley requested that the U.S. Government disclose all payments made or promises of

payments made to Mitchell and O'Connor. The U.S. Attorney in charge of the case was unaware that Mitchell and O'Connor had signed the contracts or received any payments. Thus, the U.S. Attorney told Bagley's defense counsel that no payments had been made or promised to either Mitchell or O'Connor. (Complaint, ¶¶ 35, 36, 37).

At his trial, Bagley did not seek to discredit Mitchell or O'Connor on the grounds that they had been promised pay for their work. (Complaint, ¶ 38). At the end of the trial, on December 23, 1977, Bagley was convicted of distribution of a controlled substance and sentenced to six months in prison and five years probation. (Complaint, ¶ 43).

Bagley served his sentence and was released on probation in June 1978. Two years later, in March 1979, Bagley was

arrested for firearms violations and imprisoned again.

In May 1980, while in prison, Bagley discovered that Mitchell and O'Connor had signed the contracts and received compensation for assisting in the investigation. (Complaint, ¶ 56). Bagley moved to vacate his conviction under 28 U.S.C. § 2255, alleging that the failure to disclose the contracts and the payments to Mitchell and O'Connor violated his Fifth and Sixth Amendment rights. (Complaint, ¶ 57). Bagley did not, however, file any claims against the present defendants.

On May 12, 1982, the trial court hearing Bagley's habeas motion found that O'Connor and Mitchell ". . . did expect to receive from the United States some kind of compensation, over and above their expenses for their assistance, although perhaps not for their testimony." See

Bagley v. Lumpkin, 719 F.2d 1462, 1463 (9th Cir. 1983). The court refused to vacate Bagley's conviction, however, on the ground that disclosure of the payments would not have altered Bagley's conviction. Id. at 1464.

On July 9, 1982, Bagley was released from jail.

On November 10, 1983, five years before Bagley filed this suit, the Ninth Circuit reversed the District Court's denial of Bagley's habeas motion, and also reversed Bagley's 1977 conviction. The Court's decision stated that failure to disclose the payments to Mitchell and O'Connor required an automatic reversal. Bagley v. Lumpkin, supra, 719 F.2d 1462 (9th Cir. 1983).

In January 1984, Bagley was again arrested, this time for violation of marijuana laws, and sent to prison a third time.

On July 2, 1985, the United States Supreme Court reversed the Ninth Circuit, and remanded the case with instructions to determine whether there was a reasonable probability that Bagley would not have been convicted if the payments had been disclosed. U.S. v. Bagley, 105 S. Ct. 3375, 3385, 87 L.Ed.2d 481, 473 U.S. 667 (1985). On September 2, 1986, the Ninth Circuit on remand confirmed its earlier reversal of the denial of Bagley's habeas motion and its reversal of Bagley's 1977 conviction. Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986). On January 13, 1988, Bagley's 1979 conviction was vacated on the grounds that it was the result of Bagley's 1977 conviction. United States v. Bagley, 837 F.2d 371 (9th Cir. 1988).

B. Procedural Background.

Bagley filed this action in July 1988, over eight years after learning of the misconduct at his trial and filing his

habeas motion. Bagley's Complaint seeks damages in excess of $100 million for his wrongful conviction, imprisonment and the deprivations of that imprisonment. These damage claims are set forth in ¶¶ 103-138 of Bagley's Complaint.

Paragraphs 100-102 of Bagley's complaint set forth damage claims that are unrelated to his conviction and imprisonment. These include $3 million in punitive damages for the conspiracy to violate his Fifth and Sixth Amendment Rights (Complaint, ¶ 100). He also claims $20 million in actual damages and $20 million in punitive damages for the violation of his Fifth Amendment due process rights and his Sixth Amendment right to confront witnesses. (Complaint, ¶¶ 101, 102).

In June 1989, defendants moved for judgment on the pleadings on several

grounds, including expiration of the statute of limitations.

On November 1, 1989 the Honorable William L. Dwyer granted defendants' motions. The Ninth Circuit affirmed on June 22, 1991.

The primary issue in the appeal, and the issue that Bagley wishes this court to consider, is: when did Bagley's claims accrue for purposes of the statute of limitations? Bagley claims that his claim did not accrue until 1988, when his habeas proceedings ended. The respondents assert, and the Ninth Circuit ruled, that Bagley's claim accrued in 1980, when Bagley learned of all the facts supporting his claim. As is set forth below, certiorari should not be granted because the Ninth Circuit's decision is in accord with unanimous precedent from this Court and other jurisdictions, as well as sound policy considerations.

I.

THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH DEAKINS V. MONAGHAN AND DOES NOT CONFLICT WITH THE SUPREME COURT PRECEDENT CITED BY BAGLEY. (Rebutting pp. 7-11 of Bagley's brief).

There is no conflict between the Ninth Circuit's decision and precedent from this court. The Ninth Circuit's decision is in accord with Deakins v. Monaghan, 484 U.S. 193, 108 S. Ct. 523, 98 L.Ed.2d 529 (1988), the only Supreme Court decision pertaining to the issue in this case. The Supreme Court cases cited by Bagley are not on point.

A. The Ninth Circuit's Decision is in Accord with This Court's Decision in Deakins v. Monaghan.

Deakins v. Monaghan, 108 S. Ct. 523, 484 U.S. 193, 98 L.Ed.2d 529 (1988), is the only Supreme Court decision pertinent to the issue in this case. Deakins is analogous to this case and supports the

Ninth Circuit's decision. In Deakins, the plaintiffs sought monetary damages and equitable relief when law enforcement agencies allegedly seized their business records illegally during a criminal investigation. The District Court dismissed the claim on abstention grounds, citing Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971). The Third Circuit reversed, holding that the District Court should have stayed, rather than dismissed, the suit. One of the reasons for the Third Circuit's rule was to protect plaintiffs against expiration of statutes of limitations.

In Deakins, this Court specifically approved of the rule, stating:

> In reversing the district Court's dismissal of the claims for damages and attorney's fees, the Court of Appeals applied the Third Circuit rule that requires a District Court to stay rather than dismiss claims that are not cognizable in the parallel state proceeding. 798

> F.2d, at 635, citing Crane v. Fauver, 762 F.2d 325 (CA3 1985), and Williams v. Red Bank Bd. of Ed., 662 F.2d 1008 (CA3 1981). The Third Circuit rule is sound. . . . [Footnote 7].
>
> * * *
>
> [Footnote 7] In both Crane v. Fauver, 762 F.2d 325, 329 (CA3 1985), and Williams v. Red Bank Bd. of Ed., 662 F.2d 1008, 1024, n. 16 (CA3 1981), the Court of Appeals recognized that unless it retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations.

Deakins, supra, 108 S. Ct. at 530, including n.7.

In addition, Justice White wrote a concurring opinion in Deakins that cited and approved of the Eighth Circuit's decision in McCurry v. Allen, 606 F.2d 795, 799 (8th Cir. 1979), rev'd on other grounds, 449 U.S.90, 101 S. Ct. 411, 66 L.Ed.2d 308 (1980), which adopts a similar rule:

> Moreover, dismissal might foreclose, on statute of limitations grounds, the subsequent pursuit of a damages action in federal court in the event that the state court holds that a violation of Constitutional rights took place. No doubt this is why Courts of Appeals which have applied Younger to damages actions have ordered stays, and not dismissals, of damages claims to which Younger applies [Footnote 1].
>
> [Footnote 1] See, e.g., McCurry v. Allen, 606 F.2d 795, 799 (CA8 1979), rev'd on other grounds, 449 U.S.90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980). . .

Deakins, supra, 108 S. Ct. at 531-532, including n.1.

Thus, precedent from this Court supports the Ninth Circuit's decision.

B. The Cases Cited by Bagley are Miscited and/or Distinguishable.

Further, the three Supreme Court decisions that Bagley cites are either miscited or distinguishable. Each of these cases is discussed separately below. None of these cases conflict with the

Ninth Circuit's decision or support Bagley's position.

1. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). Williamson is unrelated to the issues in Bagley's case. Williamson involved a landowner's claim that certain local government land use decisions constituted a taking under the 5th Amendment. The Williamson Court held that the landowner's claim was not ripe. The decision was based upon the fact that the landlord had not received a "final decision" on the land use application and all variance possibilities and had not sought just compensation through available state procedures:

> Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining

just compensation, respondent's claim is not ripe.

* * *

Although "the question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," (citation omitted), this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenge to action and the extent to which it interferes with reasonable investment-backed expectations (citations omitted). Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

* * *

The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not

> conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.
>
> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the state has provided for doing so.

Williamson, supra, 105 S. Ct. at 3116, 3118-3119, 3120.

The Williamson court also noted that condemnation cases differ from other areas of law because there is the presumption that a governmental entity can impose some injury or diminution in value without any claim accruing:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

Williamson, supra, 105 S. Ct. at 3123, quoting, Pennsylvania Coal Company v.

Mahon, 260 U.S. 393, 413, 43 S. Ct. 158, 67 L.Ed. 322 (1922).

There are no parallels between Williamson and Bagley's case. Bagley's claim is not for a taking by land use regulations. The issue in Bagley's case is the statute of limitations and not ripeness. Bagley's reliance on Williamson is misplaced.

2. United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979). Kubrick is a personal injury case which does not support Bagley's case. The dicta relied upon by Bagley reads as follows:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the

> plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter.

Kubrick, supra, 444 U.S. at 122.

Here, Bagley knew of the respondent's alleged wrongful acts and of his alleged injury in 1980. He was in jail and had been deprived of the right of cross-examination. There were no facts in the defendants' possession that Bagley needed in order to bring his lawsuit. Kubrick does not support Bagley's claim.

3. United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). Bagley's argument regarding his own prior case and "harmless error" fails because it is contrary to his own complaint. Bagley's argument implies that he would not have had a cause of action if the alleged misconduct had been found to

constitute "harmless error". Yet Bagley's complaint states the opposite. For example, paragraph 100 of his Complaint seeks recovery of $3,000,000 of punitive damages for the conspiracy to violate his constitutional rights. Bagley also seeks an additional $30,000,000 of damages for infliction of emotional distress (Complaint, ¶ 110), as well as, $50,000,000 for loss of reputation (Complaint, ¶ 109). Bagley's ability to pursue these claims did not depend upon the outcome of his habeas motion.

The proper course in Bagley's situation was the course mandated by the Ninth Circuit. If Bagley was concerned about pursuing his claims before the final decision on his habeas motion, filing and staying his complaint would have alleviated Bagley's concerns as well as put the respondents on notice of the claim.

Finally, Bagley's claim that the Ninth Circuit's decision will spawn a rash of frivolous suits which will clog the courts is unfounded. The simple answer is to stay the suits once they have been filed. This court has required this procedure in several instances in the past. See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454, 44 L.Ed.2d 295, 95 S. Ct. 1716 (1975); Deakins v. Monaghan, 108 S. Ct. 523, 484 U.S. 193, 98 L.Ed.2d 529 (1988).

In short, this Court's decisions are in complete accord with the Ninth Circuit's decision in this case. There is no conflict between the Ninth Circuit and this court, and there is no reason to review the Ninth Circuit's decision.

II.

THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH UNANIMOUS CASE LAW FROM LOWER COURTS.
(Rebutting pages 12-16 of Bagley's petition.)

The Ninth circuit's decision is in accord with unanimous case law from other jurisdictions. Bagley's argument that there is a conflict among the lower courts is based upon inaccurate and misleading attempts to analogize to case law does not address the issue in this case. Every case addressing this issue agrees with the Ninth Circuit. No case addressing this issue supports Bagley's position. The cases cited by Bagley either do not stand for the propositions for which they are cited or are factually distinguishable. There is no conflict among the lower courts on this issue.

A. Every Case Addressing This Issue Agrees with the Ninth Circuit.

Case law from the Third, Fifth, Eighth, Ninth and Eleventh Circuits holds that statutes of limitations on § 1983 actions begin to run prior to exhaustion of habeas corpus proceedings. These cases

have arisen when prisoners filed § 1983 damage claims prior to filing habeas claims. In accordance with well established law, the courts required the prisoners to first exhaust their habeas remedies prior to commencing § 1983 actions. However, the courts also ordered that § 1983 actions be stayed, rather than dismissed, to prevent statutes of limitations on the § 1983 claims from expiring during the habeas proceedings.

Connor v. Pickett, 522 F.2d 585 (5th Cir. 1977), is a good example. In Connor the Fifth Circuit stated:

> There is a possibility that if Connor is required to seek habeas corpus relief his right to sue for damages under § 1983 may be extinguished by the expiration of the relevant Alabama statute of limitations. Therefore we direct the district court to take such steps as may be necessary to protect Connor's right to bring a § 1983 suit after he has exhausted his habeas corpus remedies. One way of accomplishing this result would be to stay the § 1983

> action pending the outcome of the state proceedings as the district court did in Mastrachio v. Ricci, . . .

Connor, supra, 522 F.2d at 587.

Other decisions from the First, Third, Fifth, Eighth, Ninth and Eleventh Circuits are in accord with this rule. See, e.g., Bailey v. Ness, 733 F.2d 279, 283 (3rd Cir. 1984); Richardson v. Fleming, 651 F.2d 366, 375 (5th Cir. 1981); McCurry v. Allen, 606 F.2d 795, 799 (8th Cir. 1979), reversed on other grounds, Allen v. McCurry, 449 U.S. 90, 66 L.Ed.2d 308, 101 S. Ct. 411 (1980); cf. Prather v. Norman, 901 F.2d 915, 918-919 (11th Cir. 1990) (reversing and remanding district court's sua sponte dismissal of claim on several grounds, including possibility that claim should have been stayed rather than dismissed); cf. Mastrachio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909

(1975) (court stayed § 1983 action pending completion of criminal appeal without discussing statute of limitations); Young v. Kenny, 887 F.2d 237, 240 (9th Cir. 1989).

In addition to these Circuit Court decisions, the Eastern District of Pennsylvania and the Supreme Court of Wyoming have dismissed § 1983 cases because the statutes of limitations expired during pendency of the plaintiffs' criminal appeals. In Drum v. Nasuti, 648 F. Supp. 888 (E.D. Pa. 1986), the plaintiff filed a § 1983 claim alleging the defendants committed perjury during his trial. The court held that the plaintiff's cause of action accrued when the plaintiff ". . . knew or had reason to know the injury that constitutes the basis of this action, . . .". This is the same standard applicable in this case. Under that standard, the court held that the

plaintiff knew of the perjury at the time it was committed and that the § 1983 claim accrued at that time, not when the court of appeals affirmed his conviction:

> [T]he date of accrual began when the plaintiff had reason to know of the alleged false testimony in his case.
>
> . . . I must reject plaintiff's argument that his claim was not ripe until the court of appeals denied his appeal from his criminal contempt conviction in the middle district on May 18, 1984 . . . The last act which Drum complains of causing his injury would have been during his criminal contempt proceedings, in June 1983, when he 'knew' from Reif's testimony of the conspiracy he claims. It was then that the statute of limitations accrued.

Drum, supra, 648 F. Supp. at 903.

The court also rejected an argument that the criminal appeal tolled the statute of limitations, stating that the proper procedure was to file and stay the § 1983 action:

> Nor can plaintiff argue that the reason he failed to file his

> Section 1983 was that the same issues were pending in another proceeding. (Citation omitted). Rather, in such a situation, the court would stay the civil rights proceeding until the criminal proceedings had run their course. Id. Thus, the statute of limitation also bars plaintiff's claims.

648 F. Supp. at 903-904.

In Lafferty v. Nichel, 663 P.2d 168 (Wy. 1983), the court held that the statute of limitations on the plaintiff's civil rights claims under § 1983 and § 1985 began running at the time of the plaintiff's arrest, confinement and prosecution and the accrual of his claims was not delayed until his conviction was overturned:

> Appellant filed the present civil action on November 27, 1981, more than two years after his arrest, imprisonment, and conviction, but within two years of the District Court's reversal of his conviction in municipal court.

* * *

> [Plaintiff] argues that the municipal court convictions effectively estopped him from pursuing his civil claims because of the implicit finding of probable cause in those convictions. Therefore, he contends that either the claims did not accrue until the reversal of his municipal court convictions or the convictions tolled the running of the statutes of limitations until such reversal.
>
> * * *
>
> In this case the actions giving rise to the alleged civil rights violations arose upon appellant's arrest, confinement, and prosecution in March of 1979. At that time, appellant had a cause of action which could be brought against appellees.

Lafferty, supra, 663 P.2d at 169-170.

In short, ample case law directly supports the Ninth Circuit's decision. Bagley neither addresses nor mentions these cases which are all in concurrence with the Ninth Circuit.

B. No Court has Ruled in Favor of Bagley's Position.

Further, no court from any jurisdiction that has addressed this issue holds, as Bagley opines, that a claim does not accrue until habeas corpus proceedings have ended. There is no case, from any jurisdiction, which addresses facts identical or closely analogous to the facts of this case to support Bagley's position. Bagley does not cite such a case and, as the Ninth Circuit noted (923 F.2d at 761; p. 8a of Bagley's Petition), none exists.

C. The Cases Cited by Bagley are Either Miscited or Distinguishable.

Bagley cites five cases which he argues are contrary to the Ninth Circuit's decision. Each of these cases is discussed below. None of them conflict with the Ninth Circuit's decision and none of them support Bagley's position.

1. Triplett v. Azordegan, 478 F. Supp. 872 (N.D. Iowa, 1977). There are

two insurmountable problems with Bagley's reliance on Triplett. First, Triplett was decided in a District Court in the Eighth Circuit. Subsequent to Triplett, the Eighth Circuit ruled that the statute of limitations begins running on § 1983 actions before habeas proceedings are finished. McCurry v. Allen, supra. In McCurry, the Eighth Circuit ordered that a § 1983 action be stayed, rather than dismissed, to prevent the expiration of the statute of limitations while the prisoner/plaintiff exhausted his criminal appeals. McCurry, supra, 606 F.2d at 799[1].

The second problem is that Bagley mischaracterizes Triplett. Triplett is

---

[1]The Eighth Circuit's use of the word "tolling" at page 799 of the McCurry opinion is confusing in this context. Subsequent courts, including this court, have unanimously interpreted that word in the opinion to mean "running" or "expiration". See, e.g., Deakins v. Monaghan, 108 S. Ct. 523, 531-532, 484 U.S. 193, 98 L.Ed.2d 529 (1988) (J. White, concurring).

based entirely on collateral estoppel. In Triplett, the plaintiff was a former inmate who had confessed to a murder after being drugged. His criminal trial took place in 1955. During the criminal trial, the propriety and admissability of his drugged confession was addressed. In 1972, the court reversed its ruling on the propriety of the drugged confession, and reversed the conviction. Based upon that reversal, the plaintiff filed his § 1983 suit claiming that his rights had been violated because of the drugging.

The court ruled that the statute of limitations did not begin running on the § 1983 suit until 1972. It did so because the criminal trial court had specifically ruled that the drugged confession was proper, and this ruling would have estopped the plaintiff from claiming that his civil rights had been violated:

It is clear that the issues surrounding the confession were raised at trial and in post-trial motions, but failed to affect the conviction.

* * *

It is almost too evident to warrant comment that plaintiff, having been convicted of murder by virtue of a confession which in 1955 was deemed legal and admissible, could not have, at that time, pursued a § 1983 claim. (Citations omitted)

In fact, the Eighth Circuit Court of Appeals has recognized that issues determined at a criminal trial may estop the criminal defendant from relitigating them in a civil action based on § 1983. McNally v. Pulitzer Publishing Co., 532 F.2d 69 (8th Cir. 1976).

> It is well established that prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was "distinctly put in issue and directly determined" in the criminal action.

532 F.2d at 76.

The State District Court found that the conviction was based on the involuntary confession. The issue of voluntariness was

> sufficiently raised at the original trial to warrant estoppel until the court reversed the conviction in 1972.

Triplett, supra, 478 F. Supp. at 875.

Triplett is distinguishable because collateral estoppel does not apply in this case. The alleged misconduct at Bagley's criminal trial was neither addressed nor discovered at the time of Bagley's criminal trial. The ruling in Triplett is unrelated to the issue of when Bagley's claim accrued.

2. McNally v. Pulitzer Publishing Company, 532 F.2d 69 (8th Cir. 1976). For the same reasons, Bagley's reliance on McNally is erroneous. McNally is an Eighth Circuit case that was decided prior to McCurry v. Allen, supra. McNally is also a collateral estoppel case:

> In order to secure relief for the deprivation of the right to a fair trial, McNally must demonstrate that the alleged improper conduct in fact had that result. This issue,

> however, has already been decided adversely to him in the prior federal criminal prosecution and appeal. It is well established that prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was "distinctly put in issue and directly determined" in a criminal action. . . . McNally cannot now litigate again the fairness of his criminal trial.

McNally, supra, 532 F.2d at 76.

3. Prince v. Wallace, 568 F.2d 1176 (5th Cir. 1978). Prince is not pertinent for two reasons. First, Prince is a Fifth Circuit decision. The 5th Circuit decided Connor v. Picket, supra, before Prince, and Richardson v. Fleming, supra, after Prince, both of which agree with the Ninth Circuit's decision in this case. Second, the decisive issue in Prince was whether or not the one year statute of limitations applied. After it as determined that the one year statute was applicable, the

question of when the claim accrued became moot.

4. Jones v. Shankland, 800 F.2d 77 (6th Cir. 1986). Jones does not support Bagley's position. The Jones court noted that one of its previous decisions, Hadley v. Werner, 753 F.2d 514 (6th Cir. 1985), affirmed the dismissal of a § 1983 case on the ground that the plaintiff had not exhausted his habeas corpus remedies. As Bagley's brief mentions, the Jones court acknowledged that the Hadley decision "raised some question" regarding whether the § 1983 claim accrued before the habeas corpus proceedings ended. Bagley's brief fails to disclose, however, that the Jones court then questioned Hadley by referring to the Fornaris and Muskegon Theater cases, stating that those cases held it error to dismiss civil rights claims where abstention was appropriate:

> The specific relief accorded in Hadley would normally raise some question whether, therefore, the accrual of a petitioner's cause of action for damages based upon constitutional violations which also effected his liberty, would be suspended during the entire time necessary to pursue the habeas action to a successful conclusion. In another context, however, the Supreme Court in Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S. Ct. 156, 27 L.Ed.2d 174 (1970), and this Circuit in Muskegon Theaters, Inc. v. City of Muskegon, 507 F.2d 199 (6th Cir. 1974), held it error to have dismissed outright, even without prejudice, causes of action brought under the Civil Rights Act where it was determined that abstention pending the resolution of state proceedings was appropriate.

Jones, supra, 800 F.2d at 82-83.

Although Jones stated that there ". . . is logic and support for both positions, . . ." the Court's sua sponte questioning of Hadley is an implicit rejection of the case. Jones does not support Bagley's position and does not

conflict with the Ninth Circuit's decision in this case.

5. Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3rd Cir. 1985), cert. denied, 106 S. Ct. 183 (1985). Schweitzer is inapplicable for several reasons. Schweitzer is an asbestosis case from the Third Circuit and the Third Circuit has already rejected Bagley's position in a decision that is factually on point, Bailey v. Ness, supra. Furthermore, the plaintiff in Schweitzer did not know he had been injured until he filed his claim. In 1980 Bagley knew that he had not cross-examined Mitchell and O'Connor because of the failure to disclose the payments. He also knew he was in jail.

6. Moeller v. State, 474 N.W.2d 728 (S.D. 1991). Moeller is distinguishable both legally and factually. Legally, Moeller construes South Dakota law, SDCL 21-32-2, not federal law. Factually,

Moeller involved procedural error, the trying of the defendant as an adult rather than a juvenile. The issue of how the defendant should have been tried was raised and decided upon at the trial court level. Like Triplett and McNally, the trial court's decision was controlling until it was overruled. In Bagley's case, the misconduct was not addressed (or even discovered) at the trial court level.

In short, unanimous case law supports the Ninth Circuit. No case addressing this issue supports Bagley. Bagley's attempt to portray this case as an illustration of conflict between the Ninth Circuit and other jurisdictions is not accurate. There is no conflict among jurisdictions on this issue.

III.

THE NINTH CIRCUIT'S DECISION IS NOT CONTRARY TO CASE LAW REGARDING COLLATERAL ESTOPPEL. (Rebutting pp. 17-19 of Bagley's brief.)

Bagley argument regarding collateral estoppel, summarized, is as follows. In May 1982 the District Court denied Bagley's habeas motion because the alleged misconduct ". . . would not have affected the outcome of the criminal prosecution." 719 F.2d at 1463. Bagley equates this to a ruling that the Respondents' alleged conduct was "harmless error." Bagley argues that he could not have recovered from the Respondents for "harmless error," and, therefore, that the District Court's decision on his habeas motion estopped him from proceeding.

Bagley's argument fails for at least four independent reasons. First, Bagley's argument is contrary to his own complaint. Many of Bagley's claims, such as conspiracy, emotional distress and harm to reputation (Complaint, ¶¶ 100, 109, 110), account for huge damage claims ($86,000,000), and were not dependant upon

reversal of Bagley's criminal conviction. These claims could not have been estopped or affected by the District Court's ruling on the habeas motion.

Second, even if the alleged misconduct was harmless error and no actual damages resulted, case law from this court allows both nominal and punitive damages for constitutional claims in appropriate circumstances. See, e.g., Carey v. Piphus, 435 U.S. 247, 55 L.Ed.2d 252, 266-267, 98 S. Ct. 1042 (1978). Although Bagley's Petition for Certiorari claims that he could not recover for harmless error, Bagley's Complaint alleges and seeks recovery of tens of millions of dollars of nominal and punitive damages.

Third, Bagley's conviction, and the District Court's denial of Bagley's § 2254 habeas motion, were reversed in the Ninth Circuit on November 10, 1983. Bagley v. Lumpkin, 719 F.2d 1462 (9th Cir. 1983).

Both the conviction and the denial of the habeas motion lost all collateral estoppel effect at that time. Yet Bagley still waited five years to file his complaint.

Fourth, the proper procedure would be for Bagley to file his civil rights action within the limitations period and ask the District Court to stay the action pending the outcome of his habeas motion. This procedure would have prevented any conceivable concern with collateral estoppel in Bagley's case and will prevent such concerns in the future.

IV.

SOUND POLICY CONSIDERATIONS SUPPORT THE NINTH CIRCUIT'S DECISION. (Rebutting pp. 19-25 of Bagley's brief.)

Strong policy considerations support the Ninth Circuit's decision. Bagley's policy argument is without merit. The current law requiring that actions be

filed and stayed satisfies the policies behind statutes of limitation as well as the policy interests raised by Bagley: judicial economy, the right of parties to be free from litigation that might be decided in a collateral matter, and permitting meritorious civil rights claims.

Requiring that claims be filed and stayed promotes judicial economy because no activity in the litigation will occur until the habeas proceeding is decided. The burden on the judiciary of receiving and staying complaints is nominal - this court has ordered the procedure in the past and referred to the burden as "minimal". See Johnson v. Railway Express Agency, 421 U.S. 454, 44 L.Ed.2d 295, 305, 95 S. Ct. 1716 (1975); see also, Deakins v. Monaghan, supra. Further, Bagley's dire prediction of "court clogging" is belied by the actual experience of the

courts. The current law in all jurisdictions which have addressed this issue is that complaints be filed and stayed, and there is no indication of any resulting court congestion.

Staying proceedings will prevent parties from expending resources on suits that are ultimately decided in collateral proceedings. The parties need only file a stipulated order staying the proceedings. In fact, expenses will be saved because defendants will have notice of suits in a timely manner. Thus, defendants will be able to preserve relevant evidence rather than having to dredge it up many years after the fact.

Staying the proceedings will have no effect on the rights to have meritorious claims decided.

Finally, staying proceedings satisfies all of the policies behind statutes of limitation, including

protecting parties' rights to have notice of claims, protecting parties from stale claims, and preventing the injustices and expense caused by the loss of evidence, memory lapses, death or disappearance of witnesses, and loss or destruction of documents, all of which inevitably result when parties are not given timely notice of claims.

Bagley's policy argument is based solely on preventing the nominal expense of filing and staying complaints. The "minimal" burden of staying complaints is far exceeded by the expense and injustice resulting from failing to give potential defendants notice and an opportunity to preserve evidence. This is particularly true since there is no statute of limitations for habeas actions. Under Bagley's position, there would be no statute of limitations for civil rights claims, since they would be tolled until

the plaintiff decided, at his/her whim, to initiate his/her habeas proceedings.

CONCLUSION

The Ninth Circuit's decision is in accord with unanimous case law from this and other courts. Sound policy considerations support these decisions. There is no conflict among courts that have addressed this issue. None of the considerations for certiorari in Sup. Ct. R. 10 are present in this case and Bagley's Petition for Certiorari should be denied.

Respectfully submitted this 5th day of January, 1992.

GRAHAM & DUNN

By _____
James C. Fowler

Attorneys for Respondents

APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HUGHES ANDERSON BAGLEY, JR., Plaintiff, vs. NORMAN W. PRINS, an Agent of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, in his Individual Capacity, and, JAMES P. O'CONNOR, and, DONALD E. MITCHELL, and CMC REAL ESTATE CORP., a Successor to the Chicago, Milwaukee, St. Paul and Pacific Railroad, and The Soo Line Railroad, a Successor to the Chicago, Milwaukee, St. Paul and Pacific Railroad, Defendants.	No. C88-1062 COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF PURSUANT TO THE UNITED STATES CONSTITUTION (BIVENS ACTION) AND TITLE 42 U.S.C. §1983 AND §1985

I

NATURE OF THE ACTION

¶1.) This is a civil suit for monetary damages and injunctive relief pursuant to the Fifth and Sixth Amendments to the United States Constitution (Bivens action) and Title 42 U.S.C. §1983 and §1985.

II

FACTS

¶2.) At all times relevant hereto, Plaintiff Hughes Anderson Bagley, Jr. (hereinafter "Plaintiff") was a citizen of the United States entitled to the protection of the United States Constitution.

¶3.) All acts performed by the individual Defendants Norman W. Prins (hereinafter "Prins"), James P. O'Connor (hereinafter "O'Connor") and Donald E.

Mitchell (hereinafter "Mitchell") occurred within the Western District of Washington.

¶4.) At all times relevant hereto, Defendant Prins was an agent of the Bureau of Alcohol, Tobacco and Firearms (BATF), a Bureau of the United States Treasury Department, stationed in Seattle, Washington.

¶5.) At all times relevant hereto, Defendant Prins was a federal law enforcement officer acting as an agent of the BATF.

¶6.) At all times relevant hereto, Defendant Prins was acting in concert with Defendants O'Connor and Mitchell.

¶7.) Defendant Prins is a resident of the State of Washington, residing at 23330 19th Place West, Brier, Washington within the Western District of Washington.

¶8.) At all times relevant hereto, Defendant O'Connor was a law enforcement officer commissioned by the State of Washington and was acting under color of state law.

¶9.) At all times relevant hereto, Defendant O'Connor was acting in concert with Defendants Prins and Mitchell.

¶10.) At all times relevant hereto, Defendant O'Connor was employed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Co. (hereinafter the "Milwaukee Road"), a predecessor to Defendants CMC Real Estate Corp. (hereinafter "CMC") and Soo Line Railroad (hereinafter "Soo Line"), as a state commissioned law enforcement officer and was acting in that capacity pursuant to instructions from his superiors at the Milwaukee Road.

¶11.) Defendant O'Connor is a resident of the State of Washington,

residing at 419 West Fulton Street, Seattle, Washington 98109, within the Western District of Washington.

¶12.) At all times relevant hereto, Defendant Mitchell was a law enforcement officer commissioned by the State of Washington and was acting under color of state law.

¶13.) At all times relevant hereto, Defendant Mitchell was acting in concert with Defendants Prins and O'Connor.

¶14.) At all times relevant hereto, Defendant Mitchell was employed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Co., a predecessor to Defendants CMC and Soo Line, as a state commissioned law enforcement officer and was acting in that capacity pursuant to instructions from his superiors at the Milwaukee Road.

¶15.) Defendant Mitchell is a resident of the State of Washington,

residing at _____

within the Western District of Washington.

¶16.) At all times relevant hereto, the Milwaukee Road, a predecessor to Defendants CMC and Soo Line, was a corporation doing business within the State of Washington and maintained offices at First Avenue South and Massachusetts Street, Seattle, Washington, within the Western District of Washington.

¶17.) At all times relevant hereto, the Milwaukee Road, a predecessor to Defendants CMC and Soo Line, employed Defendants O'Connor and Mitchell as state commissioned law enforcement officer and supervised and approved of the actions of Defendants O'Connor and Mitchell complained of herein and giving rise to this action.

¶18.) Defendant Soo Line Railroad is a successor to the Milwaukee Road, having assumed the assets and undischarged liabilities of the Milwaukee Road pursuant to the Milwaukee Railroad Restructuring Act, Title 45 U.S.C. §901-§922 and an order of the United States District Court for the Northern District of Illinois issued on April 12, 1985.

¶19.) Defendant Soo Line is a corporation and maintains headquarters at Post Office Box 530, Minneapolis, Minnesota 55440.

¶20.) Defendant CMC is a successor to the Milwaukee Road, having assumed the non-railroad assets and undischarged liabilities of the Milwaukee Road pursuant to the Milwaukee Railroad Restructing Act, Title 45 U.S.C. §901-§922 and an order of the United States

District Court for the Northern District of Illinois issued on April 12, 1985.

¶21.) Defendant CMC is a corporation maintaining headquarters at 547 West Jackson Street, Chicago, Illinois 60606.

¶22.) Sometime in late 1976 or early 1977, Defendant Prins, acting as a federal law enforcement officer employed by the BATF, began an investigation of Plaintiff.

¶23.) In approximately April 1977, Defendant Prins solicited the services of Defendants O'Connor and Mitchell as informants to aid in Defendant Prins' investigation of Plaintiff.

¶24.) In approximately April 1977, Defendants O'Connor and Mitchell agreed to Defendant Prins' request for their services in assisting Defendant Prins' investigation of Plaintiff.

¶25.) Sometime in April, 1977, acting through Defendants O'Connor's and Mitchell's immediate supervisor, the Milwaukee Road, a predecessor to Defendants CMC and Soo Line, approved Defendants O'Connor's and Mitchell's assistance in Defendant Prins' investigation of Plaintiff while Defendants O'Connor and Mitchell were on company time and while using company facilities, including the Milwaukee Road offices at First Avenue South and Massachusetts Street in Seattle and a company vehicle.

¶26.) As part of their assistance in Defendant Prins' investigation of Plaintiff, Defendants O'Connor and Mitchell, in the presence of Defendant Prins, made sworn statements regarding their contacts with Plaintiff after each such contact.

¶27.) Each of the sworn statements referred to in ¶26 contained a disclaimer of any reward or expectation of reward by Defendants O'Connor and Mitchell for their participation in Defendant Prins' investigation of Plaintiff.

¶28.) As Defendants Prins, O'Connor and Mitchell well knew, the disclaimer of expectations of reward for Defendants O'Connor's and Mitchell's participation in Defendant Prins' investigation of Plaintiff contained in the sworn statements described in ¶26 and ¶27 were false.

¶29.) On May 3, 1977, prior to making the last of the sworn statements denying any expectation of reward for their assistance in Defendant Prins' investigation of Plaintiff, Defendants O'Connor and Mitchell, in the presence of

Defendant Prins, signed BATF Form 164-A's.

¶30.) BATF Form 164-A is a document entitled "Contract For Purchase of Information and Payment of Lump Sum Therefor".

¶31.) Beginning in approximately May, 1977, Defendants Prins, O'Connor and Mitchell conspired among themselves to violate Plaintiff's rights to Due Process and Confrontation of Witnesses, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, by concealing by means of the false sworn statements referred to in ¶26 and ¶27 the fact that Defendants O'Connor and Mitchell were to be paid for their services in Defendant Prins' investigation of Plaintiff in order to prevent Plaintiff from showing at trial that Defendants O'Connor's and Mitchell's

testimony was not credible because it had been paid for, thereby increasing the likelihood that Plaintiff would be wrongly convicted at trial and imprisoned as a result of that trial.

¶32.) The Milwaukee Road, a predecessor to Defendants CMC and Soo Line, failed to properly train and supervise Defendants O'Connor and Mitchell, as a result of which Defendants O'Connor and Mitchell were able to enter into and carry out the conspiracy to conceal their expectation of payments as described in ¶31.

¶33.) On May 11, 1977, as a result of the activities of Defendants Prins, O'Connor and Mitchell, Plaintiff was arrested by agent of the BATF.

¶34.) As a result of the activities of Defendants Prins, O'Connor and Mitchell, Plaintiff was indicted in the

Western District of Washington in case number CR77-330V.

¶35.) About one month prior to trial in case number CR77-330V, Plaintiff requested the United States government to disclose all rewards or promises of rewards to be paid to Defendants O'Connor and Mitchell for their participation in Defendant Prins' investigation of Plaintiff or their testimony at Plaintiff's trial.

¶36.) Acting in reliance on the sworn statements of Defendants O'Connor and Mitchell, made in the presence of and witnessed by Defendant Prins, Assistant United States Attorney Francis Jerome Diskin responded to Plaintiff's request described in ¶35 by advising Plaintiff's defense counsel that there were no payments or promises of payments to Defendants O'Connor and Mitchell.

¶37.) Had Assistant United States Attorney Francis Jerome Diskin known of the existence of the signed contracts providing for future payments to Defendants O'Connor and Mitchell which are described in §29, Diskin would have disclosed those documents to Plaintiff's trial counsel for use at trial in case number CR77-330V.

¶38.) Because of the sworn statements of Defendants O'Connor and Mitchell, witnessed by Defendant Prins, described in ¶26 and ¶27, denying any payment or promise of payment for Defendants O'Connor's and Mitchell's participation in Plaintiff's prosecution, Plaintiff's defense counsel did not cross examine Defendants O'Connor and Mitchell at trial in case number CR77-330V as to their motive for their testimony or

otherwise seek to discredit their testimony.

¶39.) On December 23, 1977, solely as a result of the testimony of Defendants O'Connor and Mitchell, Plaintiff was convicted of two felony counts of distribution of valium (diazepam) in violation of Plaintiff's rights of Due Process and Confrontation of Witnesses as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

¶40.) Between December 23, 1977 and January 20, 1978, solely as a result of the felony convictions described in ¶39, Plaintiff was subjected to a presentence investigation report by a United States Probation Officer.

¶41.) Solely as a result of the presentence investigation report referenced in ¶40, Plaintiff was

subjected to an invasion of his personal privacy by being required to disclose to a United States Probation Officer intimate details of his personal life, including but not limited to, details of his relationship with his former wife, the names of friends and business associates and his personal habits and finances.

¶42.) Solely as a result of the disclosures referenced in ¶41, Plaintiff's former wife, friends, business associates and family were interviewed by United States Probation Officers, resulting in further invasion of Plaintiff's right to privacy.

¶43.) On January 20, 1978, solely as a result of the conviction described in ¶39, Plaintiff was sentenced to a term of imprisonment of six months and a term of probation of five years.

¶44.) Solely as a result of the conviction set forth In ¶39, Plaintiff was imprisoned between January 20, 1978 and mid-June, 1978.

¶45.) Solely as a result of the conviction set forth in ¶39, from mid-June, 1978 through March, 1979, Plaintiff was subjected to limitations on his personal liberty by being subjected to probation and parole.

¶46.) Solely as a result of the conviction set forth in ¶39 and the probation and parole described in ¶43 and ¶45, Plaintiff was required to report to a United States Probation Officer and was required to disclose details of his personal life, resulting in further violation of Plaintiff's right to privacy.

¶47.) On March 30, 1979, solely as a result of information brought to the

government's attention solely as a result of the conviction described in ¶39 and the probation and parole described in ¶43 and ¶45, Plaintiff was again arrested by agents of the BATF and was charged in case number CR79-108M in the Western District of Washington.

¶48.) Solely as a result of the conviction described in ¶39 and the probation and parole described in ¶43 and ¶45, Plaintiff was denied his Constitutional right to bail in case number CR79-108M.

¶49.) Solely as a result of the conviction described in ¶39, Plaintiff was charged in case number CR79-108M with multiple counts of being a felon in receipt or possession of firearms.

¶50.) Solely as a result of the conviction set forth in ¶39, Plaintiff was forced to forego his right to testify

in his own behalf, as guaranteed by the Sixth Amendment to the United States Constitution, in order to prevent the jury from learning of the nature of that conviction.

¶51.) Solely as a result of the conviction set forth in ¶39, Plaintiff was convicted in case number CR79-108M of four counts of being a felon in possession or receipt of firearms.

¶52.) Because of the inability to testify in his own behalf described in ¶50, Plaintiff was convicted in case number CR79-108M of a single count of engaging in the business of selling firearms.

¶53.) On August 2, 1979, solely as a result of the conviction described in ¶39, Plaintiff was sentenced to an enhanced term of imprisonment in case number CR79-108M of twelve years.

¶54.) In February, 1980, solely as a result of the conviction described in ¶39, Plaintiff was ordered by the United States Parole Commission to serve a term of thirty months before parole, whereas had it not been for that conviction, Plaintiff would have been ordered to serve not more than eighteen months before parole.

¶55.) In April, 1986, solely as a result of the conviction described in ¶39, Plaintiff was ordered to serve a parole violator term of thirty four months by the United states Parole Commission, whereas had it not been for the conviction described in ¶39, Plaintiff would have been ordered to serve a term of not more than twenty six months.

¶56.) In May, 1980, as the result of a response to a request under the

Freedom of Information and Privacy Acts, Title 5 U.S.C. §552 and §552a, Plaintiff learned for the first time that the sworn statements described in ¶26 and ¶27 made by Defendants O'Connor and Mitchell in the presence of Defendant Prins in which Defendants O'Connor and Mitchell denied any payments or promises of payments for their part in Plaintiff's prosecution in case number CR77-330V were false because Defendants O'Connor and Mitchell had signed the BATF Form 164-A's described in ¶29 and ¶30 on May 3, 1977.

¶57.) On September 30, 1986, after more than six years of litigation, the United States Court of Appeals for the Ninth Circuit vacated Plaintiff's conviction in case number CR77-330V in Bagley v. Lumpkin, 798 F. 2d 1297 (9th Dir. 1986), ruling that the conviction had been obtained in violation of

Plaintiff's rights to Due Process and Confrontation of Witnesses, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

¶58.) On January 13, 1988, the United States Court of Appeals for the Ninth Circuit vacated all counts of felon in possession or receipt of firearms in case number CR79-108M, United States v. Bagley, 837 F. 2d 371 (9th Cir. 1988), because those counts were the result of the unconstitutional conviction in case number CR77-330V. The Court of Appeals also found that Plaintiff had been subjected to an enhanced sentence because of that unconstitutional conviction.

III

JURISDICTION

¶59.) This Court has jurisdiction over this matter under the provisions of

Title 28 U.S.C. §1331 (a) because this action arises in part under the United States Constitution. The Court also has jurisdiction under Title 28 U.S.C. §1343 because this action is also based on violations of Title 42 U.S.C. §1983 and §1985.

IV

VENUE

Venue lies in this District pursuant to Title 28 U.S.C. §1391 (b) because this action arises from acts committed within the District and all individual defendants reside within the District.

V

CAUSES OF ACTION

¶61.) The conspiracy to violate Plaintiff's Constitutional rights to Due Process and Confrontation of witnesses

guaranteed by the Fifth and Sixth Amendments to the United States Constitution, as described in ¶31, is actionable as a violation of Title 42 U.S.C. § 1985, which prohibits two or more persons from conspiring to hinder or obstruct or defeat the due course of justice with intent to deny any citizen equal protection of the laws.

¶62.) The non-disclosure of information regarding the expectation of payments by Defendants O'Connor and Mitchell described in ¶36 (hereinafter "non-disclosure"), as evidenced by the contracts described in ¶29 and ¶30, which resulted from the conspiracy described in ¶31 and was concealed by the false sworn statements described in ¶26 and ¶27, constitutes a violation of Plaintiff's right to Due Process, as guaranteed by

the Fifth Amendment to the United States Constitution.

¶63.) The non-disclosure of information regarding the expectation of payments by Defendants O'Connor and Mitchell described in ¶36 (hereinafter "non-disclosure"), as evidenced by the contracts described in ¶29 and ¶30, which resulted in the conspiracy described ¶31 and was concealed by the false sworn statements described in ¶26 and ¶27, constitutes a violation of Plaintiff's right to Confront Witnesses, as guaranteed by the Sixth Amendment to the United States Constitution.

¶64.) The conspiracy set forth in ¶31 and the non-disclosure set forth in ¶36 resulted in Plaintiff's wrongful conviction in case number CR77-330V in violation of the Due Process and Confrontation clauses of the Fifth and

Sixth Amendments to the United States Constitution.

¶65.) The conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and ¶64 resulted in violation of Plaintiff's right to privacy by virtue of Plaintiff's being subjected to coerced disclosure of personal information during the course of the presentence investigation described in ¶40-¶42.

¶66.) Solely as a result of the conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully deprived of the Constitutional right to vote.

¶67.) Solely as a result of the conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and

¶64, Plaintiff was wrongfully deprived of the Constitutional right to associate with persons of his choice.

¶68.) Solely as a result of the conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully deprived of the Constitutional right of interstate travel.

¶69.) Solely as a result of the conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully deprived of the Constitutional right to own firearms.

¶70.) Solely as a result of the conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully subjected

to loss of his good reputation from being branded as a drug dealer.

¶71.) Solely as a result of the conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and ¶64 and the various losses of Constitutional rights set forth in ¶64-¶70, Plaintiff was wrongfully subjected to the intentional infliction of emotional distress of an extreme nature and for a period of several years.

¶72.) Solely as a result of the conspiracy set forth in ¶31, the non-disclosure set forth in ¶36 and the wrongful conviction set forth in ¶39 and ¶64, Plaintiff was falsely imprisoned as set forth in ¶43 and ¶44.

¶73.) Solely as a result of the false imprisonment set forth in ¶72, Plaintiff was wrongfully subjected to

loss of income in the amount of $5,000.00.

¶74.) Solely as a result of the false imprisonment set forth in ¶72, Plaintiff was wrongfully subjected to the loss of household goods, furnishings, clothing and other personal effects in the amount of $10,000.00.

¶75.) Solely as a result of the false imprisonment set forth in ¶72, Plaintiff was wrongfully subjected to the loss of his right of privacy in that his incoming and outgoing mail was inspected and read, his phone calls were monitored and his belongings and person were subjected to random searches.

¶76.) Solely as a result of the false imprisonment set forth in ¶72, Plaintiff was wrongfully subjected to embarrassment and humiliation from random strip searches, urinalysis and

breathalyzer testing and being transported in public places while chained and manacled.

¶77.) Solely as a result of the false imprisonment set forth in ¶72, Plaintiff Was wrongfully subjected to physical distress from being forced to subsist on sub-standard food and to sleep on a steel bunk bed without adequate mattress, resulting in an ulcer and back pain.

¶78.) Solely as a result of the false imprisonment set forth in ¶72, Plaintiff was wrongfully denied the ability to exercise his visitation and custody rights with his minor son.

¶79.) Solely as a result of the false imprisonment set forth in ¶72, Plaintiff was wrongfully subjected to the intentional infliction of extreme emotional distress from the false

imprisonment itself and from the various hardships described in ¶73-¶78.

¶80.) Solely as a result of the wrongful and unconstitutional conviction set forth in ¶39 and ¶64, plaintiff was wrongfully denied his Constitutional right to bail in case number CR79-108M ¶48.

¶81.) Solely as a result of the wrongful and unconstitutional conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully subjected to prosecution in case number CR79-108M as a felon in possession or receipt of firearms as set forth in ¶49.

¶82.) Solely as a result of the wrongful and unconstitutional conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully subjected to conviction on multiple counts of being a felon in

receipt or possession of firearms in case number CR79-108M, as set forth in ¶51.

¶83.) Solely as a result of the wrongful and unconstitutional conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully deprived of the right to testify in his own behalf at trial in case number CR79-108M, as set forth in ¶50.

¶84.) Solely as a result of the wrongful and unconstitutional-conviction set forth in ¶39 and ¶64 and the wrongful conviction as a felon in possession or receipt of firearms set forth in ¶82, Plaintiff was wrongfully subjected to false imprisonment in that he was wrongfully required to serve substantial additional time in custody as set forth in ¶54.

¶85.) Solely as a result of the false imprisonment set forth in ¶84,

Plaintiff was wrongfully subjected to loss of income in the amount of $20,000.00.

¶86.) Solely as a result of the false imprisonment set forth in ¶84, Plaintiff was wrongfully subjected to a violation of his Constitutional right of privacy in that his incoming and outgoing mail was inspected and read, his telephone calls monitored, and his person and belongings were subjected to random searches.

¶87.) Solely as a result of the false imprisonment set forth in ¶84, Plaintiff was wrongly subjected to humiliation and embarrassment from random strip searches, urinalysis and breathalyzer testing and being transported in public places while chained and manacled.

¶88.) Solely as a result of the false imprisonment set forth in ¶84, Plaintiff was wrongly subjected to physical distress from being forced to subsist on substandard food and to sleep on various inadequate beds, resulting in extreme back pain and an ulcer.

¶89.) Solely as a result of the false imprisonment set forth in ¶84, Plaintiff was wrongfully denied the ability to exercise his visitation and custody rights with his minor son.

¶90.) Solely as a result of the false imprisonment set forth in ¶84, Plaintiff was wrongfully denied the right to visit his aging grandparents, with whom he had an extremely close relationship, and was prevented from making a timely deathbed visit to his grandfather.

¶91.) Solely as a result of the false imprisonment set forth in ¶84, Plaintiff was wrongfully subjected to the intentional infliction of extreme emotional distress from the wrongful imprisonment itself and from the varIous deprivations set forth in ¶80-¶90.

¶92.) Solely as a reuslt of the wrongful conviction set forth in ¶39 and ¶64, Plaintiff was wrongfully subjected to false imprisonment by being required to serve additional time in custody as set forth in ¶55.

¶93.) Solely as a result of the false imprisonment set forth in ¶55 and ¶92, Plaintiff was wrongfully subjected to loss of income in the amount of $25,000.00.

¶94.) Solely as a result of the false imprisonment set forth in ¶55 and ¶92, Plaintiff was wrongfully subjected

to a violation of his Constitutional right to privacy in that his incoming and outgoing mail was inspected and read, his telephone calls were monitored, and his person and belongings were subjected to random searches.

¶95.) Solely as a result of the false imprisonment set forth in ¶55 and ¶92, Plaintiff was wrongfully subjected to humiliation and embarrassment from random strip searches, urinalysis and breathalyzer testing and being transported in public places while chained and manacled.

¶96.) Solely as a result of the false imprisonment set forth in ¶55 and ¶92, Plaintiff was wrongfully subjected to physical distress from being forced to subsist on substandard food and to sleep on various inadequate beds, resulting in extreme back pain and an ulcer.

¶97.) Solely as a result of the false imprisonment set forth in ¶55 and ¶92, Plaintiff was wrongfully denied the ability to exercise his visitation and custody rights with his minor son.

¶98.) Solely as a result of the false imprisonment set forth in ¶55 and ¶92, Plaintiff was wrongfully subjected to the intentional infliction of emotional distress from the wrongful imprisonment itself and from the various deprivations set forth in ¶93-¶97.

¶99.) Solely as a result of the wrongful conviction set forth in ¶39 and ¶64, the various false imprisonments set forth in ¶43, ¶44, ¶72, ¶84 and ¶92 and the loss of reputation set forth in ¶70, Plaintiff was wrongfully denied the opportunity to practice and advance in a profession, resulting in the future loss of wages in the amount of $1,000,000.

VI

RELIEF SOUGHT

¶100.) For the conspiracy to violate Plaintiff's rights to Due Process and Confrontation of Witnesses, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, described in ¶31 and ¶61, Plaintiff asks an award of punitive damages in the amount of $1,000,000.00 each from Defendants Prins, O'Connor and Mitchell.

¶101.) For the actual violation of Plaintiff's Fifth Amendment right to Due Process set forth in ¶62, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶102.) For the actual violation of Plaintiff's Sixth Amendment right to Confrontation of Witnesses set forth in ¶63, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶103.) For the wrongful conviction in case number CR7T-330V set forth in Plaintiff asks an award of actual damages in the amount of $1,000,000 .00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶104.) For the violation of Plaintiff's right to privacy set forth in ¶65, Plaintiff asks an award of actual damages in the amount of $1,000,000.00

each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶105.) For the wrongful denial of the Constitutional right to vote set forth in ¶66, Plaintiff asks an award of actual damages in the amount of $3,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $3,000,000.00 from each Defendant.

¶106.) For the wrongful deprivation of the Constitutional right of association set forth in ¶67, Plaintiff asks an award of actual damages in the amount of $3,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive

damages in the amount of $3,000,000.00 from each Defendant.

¶107.) For the wrongful deprivation of the Constitutional right of interstate travel set forth in ¶68, Plaintiff asks an award of actual damages in the amount of $3,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $3,000,000.00 from each Defendant.

¶108.) For the wrongful deprivation of the Constitutional right to own firearms set forth in ¶69, Plaintiff asks an award of actual damages in the amount of $5,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $5,000,000.00 from each Defendant.

¶109.) For the wrongful loss of reputation set forth in ¶70, plaintiff asks an award of actual damages in the amount of $5,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $5,000,000.00 from each Defendant.

¶110.) For the wrongful intentional infliction of emotional distress set forth in ¶71, Plaintiff asks an award of actual damages in the amount of $3,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $3,000,000.00 from each Defendant.

¶111.) For the false imprisonment set forth in ¶72, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins,

O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶112.) For the wrongful loss of income set forth in ¶73, Plaintiff asks an award of actual damages in the amount of $1,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $50,000.00 from each Defendant.

¶113.) For the loss of household goods, furnishings, clothing and other personal effects set forth in ¶74, Plaintiff asks an award of actual damages in the amount of $2,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $50,000.00 from each Defendant.

¶114.) For the violation of the Constitutional right to privacy set forth in ¶75, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶115.) For the embarrassment and humiliation set forth in ¶76, Plaintiff asks an award of actual damages in the amount of $5,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $5,000,000.00 from each Defendant.

¶116.) For the physical distress set forth in ¶77, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and

an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶117.) For the wrongful deprivation of parental visitation and custody rights set forth in ¶78, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶118.) For the wrongful intentional infliction of emotional distress set forth in ¶79, Plaintiff asks an award of actual damages in the amount of $3,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $3,000,000.00 from each Defendant.

¶119.) For the wrongful deprivation of the Constitutional right to bail set forth in ¶80, Plaintiff asks an award of actual damages in the amount of $3,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $3,000,000.00 from each Defendant.

¶120.) For the wrongful prosecution as a felon in possession or receipt of firearms set forth in ¶81, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶121.) For the wrongful convictions as a felon in possession or receipt of firearms set forth in ¶82, Plaintiff asks

an award of actual damages in the amount of $3,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $3,000,000.00 from each Defendant.

¶122.) For the wrongful deprivation of the Constitutional right to testify in his own defense in case number CR79-108N set forth in ¶83, Plaintiff asks an award of actual damages in the amount of $5,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $3,000,000.00 from each Defendant.

¶123.) For the wrongful false imprisonment set forth in ¶84, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC

and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶124.) For the wrongful loss of income set forth in ¶85, Plaintiff asks an award of actual damages in the amount of $4,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $50,000.00 from each Defendant.

¶125.) For the wrongful violation of Plaintiff's Constitutional right of privacy set forth in ¶86, plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶126.) For the wrongfully inflicted humiliation and embarrassment set forth

in ¶87, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶127.) For the wrongfully inflicted physical distress set forth in ¶88, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶128.) For the wrongful deprivation of visitation and custody rights set forth in ¶89, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the

amount of $2,000,000.00 from each Defendant.

¶129.) For the wrongful interference with Plaintiff's relationship with his grandparents set forth in ¶90, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶130.) For the wrongful intentional infliction of emotional distress set forth in ¶91, Plaintiff asks an award of actual damages in the amount of $2,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $2,000,000.00 from each Defendant.

¶131.) For the false imprisonment set forth in ¶92, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, 0'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶132.) For the wrongfully imposed loss of income set forth in ¶93, Plaintiff asks an award of actual damages in the amount of $5,000.00 each from Defendants Prins, 0'Connor, Mitchell CMC and Soo Line and an award of punitive damages in the amount of $50,000.00 from each Defendant.

¶133.) For the wrongful violation of Plaintiff's Constitutional right to privacy set forth in ¶94, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants

Prins, 0'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶134.) For the wrongfully inflicted humiliation and embarrassment set forth in ¶95, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, 0'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶135.) For the wrongfully imposed physical distress set forth in ¶96, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, 0'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶136.) For the wrongful deprivation of parental visitation and custody rights set forth in ¶97, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶137.) For the wrongful intentional infliction of emotional distress set forth in ¶98, Plaintiff asks an award of actual damages in the amount of $1,000,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo Line and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

¶138.) For the wrongful loss of future income set forth in ¶99 Plaintiff asks an award of actual damages in the

amount of $200,000.00 each from Defendants Prins, O'Connor, Mitchell, CMC and Soo and an award of punitive damages in the amount of $1,000,000.00 from each Defendant.

VII

OTHER RELIEF SOUGHT

¶139.) Plaintiff asks an award of costs and attorney fees in an amount such as the Court shall find reasonable.

¶140.) Plaintiff asks for an award of interest on the judgment in accordance with the laws of the State of Washington.

¶141.) Plaintiff asks for an order expunging all records which were created as a result of the wrongful conviction and false imprisonments set forth above, including but not limited to the entries caused on Plaintiff's Federal Bureau of Investigation "rap sheet", Plaintiff's

Federal Bureau of Investigation "Computerized Criminal History", record maintained by the Department of Justice, the Office of the United States Attorney for the Western District of Washington, the Federal Bureau of Prisons, the United States Parole Commission, the Federal Probation Service and an order directing the Federal Bureau of Investigation to send copies of Plaintiff's corrected Federal Bureau of Investigation "rap sheet" or "Computerized Criminal History" to all agencies or persons who have received that information since May 11, 1977.

VIII

JURY DEMAND

¶142.) Plaintiff demands that the case be tried to a jury.

DATED this 23rd day of June, 1988.

Hugh Anerson Bagley, Jr.
Plaintiff Pro Se
909 7th Street
Onawa, Iowa 51040